

# ARKANSAS CODE OF 1987 ANNOTATED

OFFICIAL EDITION



VOLUME 3B • TITLE 5, CH. 50-79















# ARKANSAS CODE OF 1987 ANNOTATED



## **VOLUME 3B** **2016 Replacement** **TITLE 5: CRIMINAL OFFENSES** **(CHAPTERS 50–79)**

*Prepared by the Editorial Staff of the Publisher*

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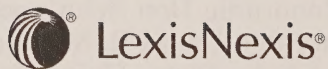
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## Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2015 Regular Session and First Extraordinary Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions  
Federal Supplement  
Federal Reporter  
United States Supreme Court Reports  
Bankruptcy Reporter  
Arkansas Law Notes  
Arkansas Law Review  
University of Arkansas at Little Rock Law Review  
American Law Reports (ALR)



## **Titles of the Arkansas Code**


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2. Agriculture
3. Alcoholic Beverages
4. Business and Commercial Law
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26. Taxation
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28. Wills, Estates, and Fiduciary Relationships

## **User's Guide**

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume are editorial changes made at the direction of the Arkansas Code Revision Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of the bound Volume 1 of the Code.





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**TITLE 5**  
**CRIMINAL OFFENSES**  
(CHAPTERS 1-49 IN VOLUME 3A)

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- 74. GANGS.
- 75. OPERATION OF AIRCRAFT WHILE INTOXICATED.
- 76. OPERATION OF MOTORBOATS WHILE INTOXICATED. [REPEALED.]
- 77. OFFICIAL INSIGNIA.
- 78. TOBACCO.
- 79. BODY ARMOR.

**Publisher's Notes.** Acts 1975, No. 928, which became effective simultaneously with the Arkansas Criminal Code on January 1, 1976, repealed former criminal provisions. Section 2 of that act provided that, although all or part of a statute defining a criminal offense was amended or repealed by the act, the statute or part thereof so amended or repealed would remain in force for the purpose of authorizing the prosecution, conviction and

punishment of a person committing an offense under the statute or part thereof prior to the effective date of the act.

For Comments regarding the Criminal Code, see Commentaries Volume B.

**Effective Dates.** Acts 1975, No. 280, § 101: effective Jan. 1, 1976.

Acts 1975, No. 928, § 1: effective simultaneously with the Arkansas Criminal Code on Jan. 1, 1976.

**CASE NOTES****Purpose.**

Purpose of the 1976 Criminal Code was to eliminate archaic statutes, replace the profusion of overlapping statutes, and de-

velop an evenhanded method of grading offenses. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

**SUBTITLE 5. OFFENSES AGAINST THE  
ADMINISTRATION OF GOVERNMENT**

**CHAPTER 50  
GENERAL PROVISIONS**

**[Reserved.]**

**CHAPTER 51  
DISLOYAL CONDUCT**

SUBCHAPTER.

- 1. GENERAL PROVISIONS. [RESERVED.]
- 2. OFFENSES GENERALLY.
- 3. SABOTAGE PREVENTION ACT.
- 4. COMMUNISTS. [REPEALED.]

**RESEARCH REFERENCES**

- Am. Jur.** 70 Am. Jur. 2d, Sedition, § 79 et seq.

**Ark. L. Rev.** The Present Status of the “Clear and Present Danger” Test as Applied to Freedom of Speech, 4 Ark. L. Rev. 52.
- Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

**C.J.S.** 87 C.J.S., Treason, § 1 et seq.

**SUBCHAPTER 1 — GENERAL PROVISIONS**  
**[Reserved.]**

**SUBCHAPTER 2 — OFFENSES GENERALLY**

SECTION.

- 5-51-201. Treason.
- 5-51-202. Advocating assassination or overthrow of government.
- 5-51-203. Usurping office.
- 5-51-204. Usurping, overturning, or seizing government.
- 5-51-205. Advocating personal injury, destruction of property, or

SECTION.

- overthrow of government  
— Writing or speaking.
- 5-51-206. [Repealed.]
- 5-51-207. [Repealed.]
- 5-51-208. Contempt for or desecration of the Arkansas flag.

- Cross References.** Conviction on testimony of accomplice, § 16-89-111.
- Fines, § 5-4-201.

Proof of overt acts, § 16-89-112.



Term of imprisonment, § 5-4-401.

**Effective Dates.** Acts 1873, No. 15,  
§ 3: effective on passage.

Acts 1919, No. 512, § 3: approved Mar.

28, 1919. Emergency declared.

Acts 1941, No. 292, § 5: effective on  
passage.

### 5-51-201. Treason.

(a) Treason against the state shall consist only in:

(1) Levying war against the state; or

(2) Adhering to the state's enemies, giving them aid and comfort.

(b) No person shall be convicted of treason unless on:

(1) The testimony of two (2) witnesses to the same overt act; or

(2) The person's own confession in open court.

(c) Treason is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608.

(d) For all purposes other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-307, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-601 — 5-4-605, 5-4-607, 5-4-608, 16-93-307, 16-93-313, and 16-93-314, treason is a Class A felony.

**History.** Rev. Stat., ch. 44, div. 2, art. 1, §§ 1, 2; C. & M. Dig., §§ 2321, 2322; Pope's Dig., §§ 2947, 2948; Acts 1975, No. 928, § 13; A.S.A. 1947, §§ 41-3951, 41-3952; Acts 2005, No. 1994, § 296; 2011, No. 570, § 31.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment, in (d), substituted "5-4-301 — 5-4-307" for "5-4-301 — 5-4-309, 5-4-311" and inserted "16-93-307, 16-93-313, and 16-93-314".

**Cross References.** Treason, Ark. Const., Art. 2, § 14.

### 5-51-202. Advocating assassination or overthrow of government.

(a) As used in this section, "government in the United States" means the United States Government or the government of the State of Arkansas.

(b) It is unlawful for any person to:

(1) Knowingly advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence or by the assassination of any officer of any government in the United States;

(2) Print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence with the intent to cause the overthrow or destruction of any government in the United States;

(3) Organize or help to organize any society, group, or assembly of persons that teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence; or

(4) Be or become a member of or affiliate with any society, group, or assembly of persons described in subdivision (b)(3) of this section, knowing the purposes of the society, group, or assembly of persons.

(c)(1) Any person who violates any provision of this section is guilty of a Class C felony.

(2) During the five (5) years next following his or her conviction, no person convicted of violating any provision of this section is eligible for employment by the State of Arkansas or by any department or agency of the State of Arkansas.

**History.** Acts 1941, No. 292, §§ 1, 3; A.S.A. 1947, §§ 41-3957, 41-3958; Acts 2005, No. 1994, § 417.

#### CASE NOTES

##### **Constitutionality.**

Former provision of this section disqualifying a person from employment by the state in any capacity because of mem-

bership in a Communistic organization was unconstitutional as it violates U.S. Const. Amend. 1. *Cooper v. Henslee*, 257 Ark. 963, 522 S.W.2d 391 (1975).

#### **5-51-203. Usurping office.**

If any person shall exercise or attempt to exercise the duties of any office created by the Arkansas Constitution and laws of this state without first being qualified in the manner prescribed by law for the discharge of the duties, the offender upon conviction is guilty of a Class D felony.

**History.** Acts 1873, No. 15, § 2, p. 22; A.S.A. 1947, § 41-3956; Acts 2005, No. C. & M. Dig., § 2848; Pope's Dig., § 3575; 1994, § 423.

#### CASE NOTES

**Cited:** *Beshear v. Clark*, 292 Ark. 47, 728 S.W.2d 165 (1987).

#### **5-51-204. Usurping, overturning, or seizing government.**

Any person who conspires with one (1) or more other persons to usurp the government of the state by force or otherwise, to overturn the government of this state, or to seize any department of the government of this state, evidenced by any act or by forcible attempt to accomplish any purpose stated in this section, commits a Class B felony.

**History.** Acts 1873, No. 15, § 1, p. 22; Acts 1975, No. 928, § 14; A.S.A. 1947, C. & M. Dig., § 2844; Pope's Dig., § 3571; § 41-3955.

#### **5-51-205. Advocating personal injury, destruction of property, or overthrow of government — Writing or speaking.**

(a) It is unlawful for any person to:



(1) Write, indict, dictate, speak, utter, publish, or declare or be interested in writing, indicting, dictating, speaking, uttering, publishing, or declaring any word, sentence, speech, or article of whatsoever nature or kind, with the intent to encourage, advise, aid, assist, or abet in the infliction of any personal injury upon any person or the taking of human life, or destruction or injury to either public or private property, without due process of law;

(2) Disseminate in any manner knowledge or propaganda that tends to destroy or overthrow the present form of government of either the State of Arkansas or the United States of America by any violence or unlawful means whatsoever; or

(3) Employ any means stated in this section calculated to cause a result stated in this section.

(b) Any person violating a provision of this section is guilty of a Class A misdemeanor.

**History.** Acts 1919, No. 512, § 1; C. & M. Dig., § 2318; Pope's Dig., § 2944; A.S.A. 1947, § 41-3953; Acts 2005, No. 1994, § 350.

### 5-51-206. [Repealed.]

**Publisher's Notes.** This section, concerning advocating personal injury, destruction of property, or overthrow of government — use of symbols, was repealed by Acts 2013, No. 1348 § 5. The section

was derived from Acts 1919, No. 512, § 2; C. & M. Dig., § 2319; Pope's Dig., § 2945; A.S.A. 1947, § 41-3954; Acts 2005, No. 1994, § 350.

### 5-51-207. [Repealed.]

**Publisher's Notes.** This section, concerning contempt for or desecration of the United States flag, was repealed by Acts 2013, No. 1348, § 6. The section was derived from Acts 1919, No. 64, §§ 1-3; C. &

M. Dig., §§ 2315-2317; Pope's Dig., §§ 2941-2943; A.S.A. 1947, §§ 41-2971 — 41-2973; Acts 1989, No. 842, § 1; 1989 (3rd Ex. Sess.), No. 75, § 1.

### 5-51-208. Contempt for or desecration of the Arkansas flag.

(a)(1) Any person who, for profit, knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon an Arkansas flag shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one (1) year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, "Arkansas flag" means any flag of Arkansas, or any part of a flag of Arkansas, made of any substance, or any size, in a form that is commonly displayed.

**History.** Acts 1995, No. 880, § 1.

**Cross References.** State flag, § 1-4-101.

## RESEARCH REFERENCES

**ALR.** Validity, and Standing to Challenge Validity, of State Statute Prohibiting Flag Desecration and Misuse. 31 A.L.R.6th 333.

## SUBCHAPTER 3 — SABOTAGE PREVENTION ACT

## SECTION.

5-51-301. Title.

5-51-302. Definitions.

5-51-303. Intentional injury to or interference with government property.

5-51-304. Intentionally defective workmanship.

## SECTION.

5-51-305. [Repealed.]

5-51-306. [Repealed.]

5-51-307. Closing and restricting use of highway.

5-51-308. [Repealed.]

5-51-309. [Repealed.]

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**Effective Dates.** Acts 1941, No. 312, § 11: Mar. 26, 1941. Emergency clause provided: "It is found to be a fact that subversive activities threaten in many instances the success of America's defense efforts, a threat that may have already been extended to Arkansas; Therefore,

this Act being necessary for the public peace, health, and safety of the citizens of Arkansas, an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

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**5-51-301. Title.**

This subchapter may be cited as the "Sabotage Prevention Act".

**History.** Acts 1941, No. 312, § 1A; A.S.A. 1947, § 41-3959.

**5-51-302. Definitions.**

As used in this subchapter:

(1) "Highway" includes any private or public street, way, or other place used for travel to or from property;

(2) "Highway commissioners" means any individual, board, or other body having authority under then-existing law to discontinue the use of the highway which it is desired to restrict or close to public use and travel; and

(3) "Public utility" includes any pipeline, gas, electric, heat, water, oil, sewer, telephone, telegraph, radio, railway, railroad, airplane, transportation, communication, or other system, owned or operated by anyone for public use.

**History.** Acts 1941, No. 312, § 1B; A.S.A. 1947, § 41-3960.

**5-51-303. Intentional injury to or interference with government property.**

Any person who knowingly and intentionally destroys or injures any article or thing belonging to the United States, the State of Arkansas, or any county, city, or other subdivision of this state with intent to hinder or interfere with the owner in the preparation for prosecution of war or in the owner's use for defense purposes is guilty of a Class D felony.

**History.** Acts 1941, No. 312, § 2; A.S.A. 1947, § 41-3961; Acts 2005, No. 1994, § 424.

**5-51-304. Intentionally defective workmanship.**

Any person who knowingly and intentionally makes or causes to be made any defective article or thing to be used by the United States, the State of Arkansas, or any subdivision of this state with intent to injure or hinder the United States, the State of Arkansas, or any subdivision of this state in the preparation for war, the prosecution of war, or in the United States, the State of Arkansas, or any subdivision of this state's use for defense purposes is guilty of a Class D felony.

**History.** Acts 1941, No. 312, § 3; A.S.A. 1947, § 41-3962; Acts 2005, No. 1994, § 424.

**5-51-305. [Repealed.]**

**Publisher's Notes.** This section, concerning unlawful entry on property, was repealed by Acts 2013, No. 1348, § 7. The

section was derived from Acts 1941, No. 312, § 7; A.S.A. 1947, § 41-3964; Acts 2005, No. 1994, § 409.

**5-51-306. [Repealed.]**

**Publisher's Notes.** This section, concerning questioning and detaining suspected persons, was repealed by Acts 2013, No. 1348, § 8. The section was de-

rived from Acts 1941, No. 312, § 8; A.S.A. 1947, § 41-3965; Acts 2005, No. 1994, § 316.

**5-51-307. Closing and restricting use of highway.**

(a) If it becomes necessary for a public highway to be closed to travel for the protection of the public, it is lawful for the prosecuting attorney of the county where the public highway is sought to be closed to apply to the circuit judge for an order closing the public highway, stating in writing the reasons and necessity for the order.

(b) The circuit judge shall cause reasonable notice to be given to all interested parties that the application is made, fixing a time and place for hearing.



(c) All parties interested as landowners or users of the public highway or to be affected by the closing are entitled to be made parties to the cause and heard on the application.

(d) If the circuit judge finds from the evidence that it is reasonable, just, and proper that travel on the public highway should be restricted or prevented, an appropriate order shall be made by the circuit judge to do so, having due regard to the rights of the public and all parties in interest.

(e) Any aggrieved person may appeal from the order as in any other case.

**History.** Acts 1941, No. 312, § 9; A.S.A. 1947, § 41-3966; Acts 2005, No. 1994, § 259.

### 5-51-308. [Repealed.]

**Publisher's Notes.** This section, concerning witnesses' privileges, was repealed by Acts 2013, No. 1348, § 9. The

section was derived from Acts 1941, No. 312, § 6; A.S.A. 1947, § 41-3963.

### 5-51-309. [Repealed.]

**Publisher's Notes.** This section, concerning rights of labor not impaired, was repealed by Acts 2013, No. 1348, § 10.

The section was derived from Acts 1941, No. 312, § 10; A.S.A. 1947, § 41-3967.

## SUBCHAPTER 4 — COMMUNISTS

### SECTION.

5-51-401 — 5-51-404. [Repealed.]

**Effective Dates.** Acts 2003, No. 798, § 2: Mar. 27, 2003. Emergency clause provided: "It is found and determined by the General Assembly that Arkansas Code §§ 5-51-401 through 5-51-404 have never been enforced; that these sections of the Arkansas Code are of dubious validity under the First Amendment to the United States Constitution; that litigation is currently pending challenging the constitutionality of these unenforced sections of the Arkansas Code; and this act is immediately necessary because the state wishes to avoid any liability for attorneys'

fees or costs as a result of the litigation. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

**5-51-401 — 5-51-404. [Repealed.]**

**Publisher's Notes.** This subchapter, concerning the Communist Party, prohibitions on party operation and membership, and registration requirements, was repealed by Acts 2003, No. 798, § 1. The subchapter was derived from the following sources:

5-51-401. Acts 1961, No. 15, § 1; A.S.A. 1947, § 41-3971.

5-51-402. Acts 1961, No. 15, § 2; A.S.A. 1947, § 41-3972.

5-51-403. Acts 1961, No. 15, §§ 3, 4; A.S.A. 1947, §§ 41-3973, 41-3974.

5-51-404. Acts 1951, No. 401, §§ 1-3; 1975, No. 928, § 16; A.S.A. 1947, §§ 41-3968 — 41-3970.

## CHAPTER 52

### CORRUPTION IN PUBLIC OFFICE

SECTION.

5-52-101. Abuse of public trust.

5-52-102, 5-52-103. [Repealed.]

5-52-104. Soliciting unlawful compensation.

5-52-105. Attempt to influence a public servant.

SECTION.

5-52-106. Misuse of confidential information.

5-52-107. Abuse of office.

5-52-108. Compensation for speeches and appearances.

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**Cross References.** Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

**Effective Dates.** Init. Meas. 1990, No.

1, § 9; Dec. 7, 1990, except that §§ 1, 2, 3(e) and (j), (4), and § 7-6-215 of § 6 shall become effective on Nov. 7, 1990.

### RESEARCH REFERENCES

**Am. Jur.** 12 Am. Jur. 2d, Bribery, § 11 et seq.

63C Am. Jur. 2d, Pub. Off., § 369 et seq.

**Ark. L. Rev.** Official Misconduct Under the Arkansas Criminal Code, 30 Ark. L. Rev. 160.

**C.J.S.** 11 C.J.S., Bribery, § 3.

67 C.J.S., Officers, § 447 et seq.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Criminal Law, 4 U. Ark. Little Rock L.J. 189.

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#### 5-52-101. Abuse of public trust.

(a) A person commits the offense of abuse of public trust if the person:

(1) Solicits, accepts, or agrees to accept on behalf of any person, political party, or other organization any benefit from another person upon an agreement or understanding that the other person will or may be appointed a public servant or designated or nominated as a candidate for public office;

(2) Offers, confers, or agrees to confer any benefit and the receipt of the benefit is prohibited by this section;

(3) Solicits, accepts, or agrees to accept any benefit as compensation or consideration for having as a public servant given a decision, opinion,

recommendation, or vote favorable to another person or for having otherwise exercised his or her discretion in favor of another person; or

(4) Offers, confers, or agrees to confer any benefit upon a public servant and the receipt of the benefit is prohibited by this section.

(b) It is not a defense to a prosecution under this section that the decision, opinion, recommendation, vote, or use of discretion, except for the benefit, was otherwise proper.

(c) Abuse of public trust is a:

(1) Class B felony if the value of the benefit is twenty-five thousand dollars (\$25,000) or more;

(2) Class C felony if the value of the benefit is five thousand dollars (\$5,000) or more but less than twenty-five thousand dollars (\$25,000); or

(3) Class D felony if the value of the benefit is less than five thousand dollars (\$5,000).

**History.** Acts 1975, No. 280, § 2701; A.S.A. 1947, § 41-2701; Acts 2005, No. 1994, § 328; 2015, No. 1270, § 1.

inserted “person” twice in (a)(3); and re-wrote (c), which formerly provided that abuse of public trust is a Class D felony.

**Amendments.** The 2015 amendment

CASE NOTES

**Cited:** McCuen v. State, 328 Ark. 46, 941 S.W.2d 397 (1997).

5-52-102, 5-52-103. [Repealed.]

**Publisher’s Notes.** These sections, concerning unlawful compensation for past official action and public servant bribery, were repealed by Acts 2005, No. 1994, § 531. The sections were derived from the following sources:

5-52-102. Acts 1975, No. 280, § 2702; A.S.A. 1947, § 41-2702.

5-52-103. Acts 1975, No. 280, § 2703; A.S.A. 1947, § 41-2703.

5-52-104. Soliciting unlawful compensation.

(a) A person commits the offense of soliciting unlawful compensation if he or she requests a benefit for the performance of an official action as a public servant knowing that he or she is required to perform that action:

(1) Without compensation, other than authorized salary or allowances; or

(2) At a level of compensation lower than that requested.

(b) Soliciting unlawful compensation is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2704; A.S.A. 1947, § 41-2704.



**CASE NOTES**

**Cited:** *Gaines v. McCuen*, 296 Ark. 513, 758 S.W.2d 403 (1988).

**5-52-105. Attempt to influence a public servant.**

(a) A person commits the offense of attempting to influence a public servant if he or she threatens violence or economic reprisal against any person or uses deceit with the purpose to alter or affect a public servant's decision, vote, opinion, or action concerning any matter which is afterwards to be considered or performed by the public servant or the agency or body of which the public servant is a member.

(b) Attempt to influence a public servant is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2705; A.S.A. 1947, § 41-2705.

**CASE NOTES**

**Cited:** *Gaines v. McCuen*, 296 Ark. 513, 758 S.W.2d 403 (1988).

**5-52-106. Misuse of confidential information.**

(a) A public servant commits the offense of misuse of confidential information if, in contemplation of official action by himself or herself or a governmental unit with which he or she is associated or in reliance on information to which he or she has access in his or her official capacity and which has not been made public, the public servant:

(1) Acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or

(2) Speculates or aids another to speculate on the basis of the information.

(b) Misuse of confidential information is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2706; A.S.A. 1947, § 41-2706.

**5-52-107. Abuse of office.**

(a) A person commits the offense of abuse of office if, being a public servant and with the purpose of benefiting in a pecuniary fashion himself or herself or another person or of harming another person, the person knowingly:

(1) Commits an unauthorized act which purports to be an act of his or her office; or

(2) Omits to perform a duty imposed on him or her by law or clearly inherent in the nature of his or her office.

(b) Abuse of office is a Class B misdemeanor.

**History.** Acts 1975, No. 280, § 2707;  
A.S.A. 1947, § 41-2707.

### 5-52-108. Compensation for speeches and appearances.

(a) Except for the compensation a member of the General Assembly is entitled to from the State of Arkansas for the performance of his or her duties, no member shall solicit or accept compensation for speeches or other appearances before a group of persons unless the appearance is made as part of the normal course of business in the legislative member's private occupation.

(b) For the purpose of this section, "compensation" means any money or anything of value received or to be received as a claim for services, whether in the form of a retainer, fee, salary, expense, allowance, honorarium, forbearance, forgiveness, interest, dividend, royalty, rent, or any other form of recompense or any combination thereof. "Compensation" does not include payments received for food, lodging, or travel which bears a relationship to a legislative member's office when such member is appearing in an official capacity.

(c) Any person who knowingly or willfully violates this section shall upon conviction be guilty of a Class A misdemeanor.

**History.** Init. Meas. 1990, No. 1, § 8;  
2005, No. 1994, § 221.

## CHAPTER 53

### OFFENSES RELATING TO JUDICIAL AND OTHER OFFICIAL PROCEEDINGS

#### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. THREATENING A JUDICIAL OFFICIAL OR JUROR.

**Publisher's Notes.** For Comments regarding the Criminal Code, see Commentaries Volume B.

**Cross References.** False statement in

report of fees, § 21-7-201.

Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

#### RESEARCH REFERENCES

**ALR.** Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action. 4 A.L.R.4th 829.

Statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 A.L.R.4th 888.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 A.L.R.4th 800.

Attorney acting for client: Liability for malicious prosecution. 46 A.L.R.4th 249.

**Am. Jur.** 12 Am. Jur. 2d, Bribery, § 1 et seq.

52 Am. Jur. 2d, Mal. Pros., § 7.

58 Am. Jur. 2d, Obst. Jus., § 1 et seq.

60A Am. Jur. 2d, Perjury, § 1 et seq.

**C.J.S.** 11 C.J.S., Bribery, § 1 et seq.

54 C.J.S., Mal. Pros., § 1 et seq.  
 67 C.J.S., Obst. Jus., § 1 et seq.  
 70 C.J.S., Perjury, § 1 et seq.

**U. Ark. Little Rock L.J.** Survey of  
 Arkansas Law: Criminal Law, 4 U. Ark.  
 Little Rock L.J. 189.

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## SUBCHAPTER 1 — GENERAL PROVISIONS

### SECTION.

- 5-53-101. Definitions.
- 5-53-102. Perjury generally.
- 5-53-103. False swearing generally.
- 5-53-104. Perjury — Retraction.
- 5-53-105. Perjury or false swearing — Oath.
- 5-53-106. Perjury or false swearing — Inconsistent statements.
- 5-53-107. Perjury or false swearing — Proof.
- 5-53-108. Witness bribery.
- 5-53-109. Intimidating a witness.
- 5-53-110. Tampering.
- 5-53-111. Tampering with physical evidence.
- 5-53-112. Retaliation against a witness, informant, or juror.

### SECTION.

- 5-53-113. Juror bribery.
- 5-53-114. Intimidating a juror, a witness, or an informant.
- 5-53-115. Jury tampering.
- 5-53-116. Simulating legal process.
- 5-53-117 — 5-53-129. [Reserved.]
- 5-53-130. [Repealed.]
- 5-53-131. Frivolous, groundless, or malicious prosecutions.
- 5-53-132. Misconduct in selecting or summoning jurors.
- 5-53-133. Approaching jury commissioners to influence juror selections.
- 5-53-134. Violation of an order of protection.

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**Publisher's Notes.** Because of the enactment of Subchapter 2 of this chapter by Acts 2003, No. 1313, the provisions of this chapter existing before that act have been designated as Subchapter 1.

**Effective Dates.** Acts 1871, No. 31, § 7: effective 30 days after passage.

Acts 1941, No. 365, § 5: effective on passage.

Acts 1991, No. 267, § 5: Feb. 28, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that since the recent court decision in *Bates v. Bates*, this state has lacked adequate remedies for dealing with domestic violence and abuse; that the problem of domestic violence and abuse in our society is so complex that proper judicial remedies for victims and potential victims transcend the traditional jurisdictions of circuit and municipal court; that immediate intervention through arrest upon probable cause to protect the victim from physical injury is one remedy which should be provided in this state as in other states; that every potential remedy should be made available to members of households who have

been subjected to abuse or are likely to be subjected to abuse such as to create the crime of violation of an order of protection. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect upon its passage and approval."

Acts 1991, No. 1236, § 5: Apr. 10, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 267 of 1991 is in need of a technical correction; Act 267 of 1991 went into effect on February 28, 1991, and therefore this act should go into effect immediately in order to clarify the law as soon as possible. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 2009, No. 331, § 3: Mar. 10, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that domestic violence is on the rise and poses a danger



to the public; that increasing the penalty for repeat offenders aids both law enforcement and the victims of domestic violence and that this act is immediately necessary because current enforcement and prosecution will be greatly aided by the new, more serious penalties for those persons who repeatedly violate orders of protection. Therefore, an emergency is declared to exist and this act being immediately nec-

essary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

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### 5-53-101. Definitions.

As used in this subchapter:

(1)(A) "False material statement" means any false statement, regardless of its admissibility under the rules of evidence, which affects or could affect the course or outcome of an official proceeding or the action or decision of a public servant in the performance of any governmental function.

(B) Whether a false statement is material in a given factual situation is a question of law;

(2)(A) "Juror" means a member of any jury, including a grand jury and a petit jury.

(B) "Juror" also includes any person who has been drawn or summoned as a prospective juror;

(3)(A) "Oath" means swearing, affirming, and any other mode authorized by law of attesting to the truth of that which is stated.

(B) A written statement is treated as if made under oath if the written statement:

(i) Was made on or pursuant to a form bearing notice, authorized by law, to the effect that a false statement made pursuant to the form is punishable;

(ii) Recites that it was made under oath, and the declarant was aware of the recitation at the time he or she signed the written statement and intended that the written statement should be considered a sworn statement; or

(iii) Is made, used, or offered with the purpose that it be accepted as compliance with a statute, rule, or regulation which requires a statement under oath or other like form of attestation to the truth of the matter contained in the statement;

(4)(A) "Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, parole revocation judge, commissioner, notary, or other person taking testimony or depositions in any such proceeding.

(B) "Official proceeding" includes the signing or marking, under oath, of:

(i) A voter registration application;

- (ii) An application for absentee ballot; or
- (iii) A precinct voter registration list;
- (5) “Testimony” includes an oral or written statement, document, or any other material that is or could be offered by a witness in an official proceeding;
- (6) “Threat” means a menace, however communicated, to:
  - (A) Use physical force against any person; or
  - (B) Harm substantially any person with respect to his or her property, health, safety, business, calling, career, financial condition, reputation, or a personal relationship; and
- (7)(A) “Witness” means:
  - (i) Any person for whose attendance to give testimony at an official proceeding any process has issued; or
  - (ii) Any person who is holding or plans to hold himself available to give testimony at an official proceeding.
- (B) For the purpose of the Arkansas Criminal Code, a person is a “witness” if testimony is sought or offered by personal attendance at an official proceeding or by deposition or affidavit.

**History.** Acts 1975, No. 280, § 2601; A.S.A. 1947, § 41-2601; Acts 1995, No. 927, § 1; 1995, No. 938, § 1; 2003, No. 1185, § 5; 2013, No. 320, § 1.

**Amendments.** The 2013 amendment

inserted “parole revocation judge” in (4)(A).

**Meaning of “Arkansas Criminal Code”.** See note at § 5-1-101.

## CASE NOTES

### ANALYSIS

Evidence.

Oath.

Official Proceeding.

### Evidence.

Substantial evidence supported defendant's conviction for intimidating a witness where, after learning that the witness told police that she observed defendant's son commit murder, defendant threatened to kill the witness, burn her house down and harm her children; the trial court, sitting as the finder of fact, could have found that defendant threatened the witness with the purpose of influencing her testimony or inducing her not to testify. *Reed v. State*, 91 Ark. App. 267, 209 S.W.3d 449 (2005).

In a case in which defendant appealed his conviction for intimidating a witness, he unsuccessfully argued that the evidence was insufficient to support the conviction. The jury, acting as the fact-finder, weighed the evidence and determined that a letter from defendant to the witness

contained a threat intended to influence the witness's testimony; the letter constituted substantial evidence to support the jury verdict. *Cunningham v. State*, 2010 Ark. App. 130 (2010).

### Oath.

Where affidavit stated that it was subscribed and sworn to before municipal judge and the judge questioned the witness about the content of the affidavit, asked if the statements therein were true, and had witness sign in his presence, it was unimportant that the judge did not require the witness to raise his right hand and state orally that the statements in the affidavit were “the truth, the whole truth, and nothing but the truth, so help me God” and the affidavit was properly sworn to under oath. *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983).

### Official Proceeding.

Statement by the witness given under oath to the deputy prosecuting attorney held to be given in an official proceeding. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Defendant's first-degree murder conviction was overturned and the case was remanded for a new trial where a witness's prior inconsistent statement was improperly admitted under Ark. R. Evid. 801(d)(1); the statement, which was taken by a detective, was not taken during an "official proceeding," as defined by this

section, such that a false statement would be subject to the penalty of perjury, as the detective was not an official authorized to take the statement. *Stephens v. State*, 98 Ark. App. 196, 254 S.W.3d 1 (2007).

**Cited:** *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

### 5-53-102. Perjury generally.

(a) A person commits perjury if in an official proceeding he or she knowingly:

(1) Makes a false material statement under an oath required or authorized by law; or

(2) Applies for or submits an absentee ballot for a city, school district, county, state, or federal election knowing that he or she is unlawfully applying for or unlawfully submitting the absentee ballot.

(b) Lack of knowledge of the materiality of the statement is not a defense to a charge of perjury under this section.

(c) Perjury is a Class C felony.

**History.** Acts 1975, No. 280, § 2602; A.S.A. 1947, § 41-2602; Acts 2015, No. 1166, § 1.

**Amendments.** The 2015 amendment added (a)(2) and redesignated former provisions of (a) as (a)(1); in the opening

language of (a), substituted "an official" for "any official" and added "knowingly"; deleted "knowing it to be false" following "statement" in (a)(1); and added "under this section" in (b).

### CASE NOTES

#### ANALYSIS

In General.  
Evidence.  
Indictment or Information.  
Instructions.  
Material Statements.  
Official Proceeding.  
Persons Chargeable.  
Withdrawn Guilty Pleas.

#### In General.

Perjury was an offense against the sovereign whose law was violated by the making of the false oath. *State v. Kirkpatrick*, 32 Ark. 117 (1877) (decision under prior law).

#### Evidence.

Prior inconsistent statement by the witness, given under oath to the deputy prosecuting attorney, was admissible for its substantive content, and the witness was subject to perjury penalties under this

section. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Conviction for the crime of perjury must be based upon the testimony of at least one witness plus corroborating evidence; the corroborating evidence must go to material testimony adduced by the State and not the testimony on some immaterial matter. *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

#### Indictment or Information.

An indictment for perjury was not required to charge in haec verba that the false testimony was material if it stated facts from which its materiality resulted as a legal conclusion. *State v. Nees*, 47 Ark. 553, 2 S.W. 184 (1886) (decision under prior law).

For cases discussing the sufficiency of indictments or informations, see *Blevins v. State*, 85 Ark. 195, 107 S.W. 393 (1908); *Smith v. State*, 91 Ark. 200, 120 S.W. 985 (1909); *Loudermilk v. State*, 110 Ark. 549,



162 S.W. 569 (1913); *Claborn v. State*, 115 Ark. 387, 171 S.W. 862 (1914); *Davis v. State*, 131 Ark. 542, 199 S.W. 902 (1917); *Cockrum v. State*, 186 Ark. 14, 52 S.W.2d 642 (1932); *Balentine v. State*, 259 Ark. 590, 535 S.W.2d 221 (1976) (preceding decisions under prior law).

In indictments for perjury, the falsity of the testimony or statement for which the defendant was indicted could be shown by the indictment to be material either by direct averment or by allegations from which the materiality appeared. *Cockrum v. State*, 186 Ark. 14, 52 S.W.2d 642 (1932) (decision under prior law).

### Instructions.

Failure to charge the jury that a conviction could not be had save on the testimony of two credible witnesses or on that of one witness corroborated by other evidence could not be complained of unless the appellant asked for an instruction on that point. *Scott v. State*, 77 Ark. 455, 92 S.W. 241 (1906) (decision under prior law).

### Material Statements.

Perjury consisted in false and corrupt testimony relating not only to the main fact in issue, but also to material circumstances tending to prove the issue. *Nelson v. State*, 32 Ark. 192 (1877) (decision under prior law).

The materiality of the testimony alleged to be perjury had to be established by evidence and not left to presumption or inference. *Nelson v. State*, 32 Ark. 192 (1877); *Marvin v. State*, 53 Ark. 395, 14 S.W. 87 (1890) (preceding decisions under prior law).

Questions held to be material and false answers thereto would sustain an indictment for perjury. *Lewis v. State*, 78 Ark. 567, 94 S.W. 613 (1906) (decision under prior law).

False testimony not tending to prove a material issue in the case held not to constitute perjury. *Reidhar v. State*, 86 Ark. 525, 111 S.W. 1127 (1908) (decision under prior law).

In an investigation before a grand jury, any testimony was material whose necessary effect was to suspend, if not prevent, further investigation of a subject of inquiry. *Smith v. State*, 91 Ark. 200, 120 S.W. 985 (1909) (decision under prior law).

Where the undisputed evidence in a perjury case showed that the alleged false

matters sworn to were material, the failure of the court to instruct the jury that the alleged false evidence had to be shown to be not only false but also material to the issue was not error. Where there was no dispute as to the facts sworn to, the question of materiality was for the court. *Brooks v. State*, 91 Ark. 505, 121 S.W. 740 (1909); *Barre v. State*, 99 Ark. 629, 139 S.W. 641 (1911) (preceding decisions under prior law).

In perjury cases it was not necessary that the false testimony would tend directly to prove the particular issue in the trial in which it was given, but if it was circumstantially material or tended to support or give credit to witnesses with respect to the main fact or to discredit a witness, it was sufficient to constitute the basis of the charge. *Harris v. State*, 119 Ark. 408, 177 S.W. 1144 (1915) (decision under prior law).

The materiality of the statements in an affidavit was not an essential element of perjury. *Williams v. State*, 259 Ark. 667, 535 S.W.2d 842 (1976) (decision under prior law).

If the false statement is material to the issue being tried, it does not matter whether the defendant is guilty or innocent of the collateral charge being tried or whether the State's evidence may fail in its proof; it is only necessary that the false statement be capable of influencing the outcome of the proceedings. *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

Testimony held to be material. *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

### Official Proceeding.

Giving false testimony in a trial before a police court was perjury. *Gardner v. State*, 80 Ark. 264, 97 S.W. 48 (1906) (decision under prior law).

Perjury could not be assigned on an affidavit for appeal from justice of the peace. *Jackson v. State*, 90 Ark. 577, 119 S.W. 1129 (1909) (decision under prior law).

Statement by a witness given under oath to deputy prosecuting attorney was given at an official proceeding. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Defendant's first-degree murder conviction was overturned and the case was

remanded for a new trial where a witness's prior inconsistent statement was improperly admitted under Ark. R. Evid. 801(d)(1); the statement, which was taken by a detective, was not taken during an "official proceeding" such that a false statement would be subject to the penalty of perjury, as the detective was not an official authorized to take the statement. *Stephens v. State*, 98 Ark. App. 196, 254 S.W.3d 1 (2007).

Substantial evidence supported defendant's conviction for perjury, under subsection (a) of this section, where given the contradictions between state trial testimony and the facts adduced at a federal plea hearing, the jury could have reasonably inferred that defendant knowingly gave false material testimony under oath in an official proceeding. *Stewart v. State*, 2010 Ark. App. 323, 374 S.W.3d 811 (2010).

#### **Persons Chargeable.**

One who induced his wife to make a false affidavit was not guilty of perjury.

*Thomas v. State*, 149 Ark. 68, 231 S.W. 200 (1921) (decision under prior law).

#### **Withdrawn Guilty Pleas.**

Rule 410 of the Uniform Rules of Evidence is intended to protect an accused who has been permitted to withdraw a plea of guilty in accordance with Ark. R. Crim. P. 25 from having his guilty plea used against him as an admission against interest when he is tried on those same charges; it does not render the defendants' guilty pleas privileged from a prosecution for perjury where the defendants later filed motions to withdraw their guilty pleas and testified that they had lied at the hearing on their guilty pleas. *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986).

**Cited:** *In re Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992).

### **5-53-103. False swearing generally.**

(a) A person commits false swearing if other than in an official proceeding he or she makes a false material statement, knowing it to be false, under an oath required or authorized by law.

(b) Lack of knowledge of the materiality of the statement is not a defense to a charge of false swearing.

(c) False swearing is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2603; A.S.A. 1947, § 41-2603.

### **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.

### **CASE NOTES**

#### **Charge.**

Factual question not resolved as to whether probable cause existed to charge defendant with false swearing or theft by

deception. *First Commercial Bank v. Kremer*, 292 Ark. 82, 728 S.W.2d 172 (1987).

**Cited:** *Hester v. Langston*, 297 Ark. 87, 759 S.W.2d 797 (1988).

**5-53-104. Perjury — Retraction.**

(a) It is a defense to a prosecution for perjury that the defendant retracted his or her false material statement:

(1) In a manner showing a complete and voluntary retraction of the statement;

(2) During the course of the same official proceeding in which the statement was made; and

(3) Before the subject matter of the official proceeding was submitted to the ultimate trier of fact.

(b) A statement made in a separate hearing at a separate stage of the same case or administrative proceeding is deemed to have been made in the course of the same proceeding.

(c) Any person who in making a retraction causes termination of any official proceeding by reason of prejudice to a legal right of a party to the official proceeding is guilty of a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2606;  
A.S.A. 1947, § 41-2606.

**CASE NOTES****Stages of Same Proceeding.**

While subsection (b) of this section provides that separate stages of the same case shall be deemed to have been made in the course of the same proceeding, the hearing on plea withdrawal and the hear-

ing on the accepted guilty pleas were not part of the same proceeding when the previous phase ended with the acceptance of the guilty pleas. *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986).

**5-53-105. Perjury or false swearing — Oath.**

It is no defense to a prosecution under §§ 5-53-102 and 5-53-103 that:

(1) The oath was administered or taken in an irregular manner; or

(2) The person administering the oath lacked authority to administer the oath if the taking of the oath was required by law.

**History.** Acts 1975, No. 280, § 2607;  
A.S.A. 1947, § 41-2607.

**5-53-106. Perjury or false swearing — Inconsistent statements.**

(a) When a person charged with perjury or false swearing has made inconsistent material statements under oath and affecting the same matter or transaction, all the several inconsistent material statements may be charged in different counts of the same indictment or information.

(b) Proof of the inconsistency of statements is of itself evidence that one (1) of the statements is false, and it is not necessary to sustain a conviction to establish which statement is false.

(c) If one (1) inconsistent statement, if false, would constitute perjury and the other inconsistent statement, if false, would constitute only false swearing, the defendant may be convicted only of false swearing.



(d) Nothing in this section prevents a conviction of perjury when proof of perjury is established by evidence other than proof of inconsistent statements.

**History.** Acts 1975, No. 280, § 2604;  
A.S.A. 1947, § 41-2604.

#### CASE NOTES

**Cited:** Fleming v. State, 14 Ark. App. State, 288 Ark. 517, 707 S.W.2d 313 205, 686 S.W.2d 803 (1985); Brown v. (1986).

#### 5-53-107. Perjury or false swearing — Proof.

Except for a prosecution based upon inconsistent statements, in any prosecution for perjury or false swearing falsity of a statement may not be established solely through contradiction by the uncorroborated testimony of a single witness.

**History.** Acts 1975, No. 280, § 2605;  
A.S.A. 1947, § 41-2605.

#### CASE NOTES

##### **Corroboration.**

Conviction for the crime of perjury must be based upon the testimony of at least one witness plus corroborating evidence; the corroborating evidence must go to ma-

terial testimony adduced by the state and not the testimony on some immaterial matter. Fleming v. State, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

#### 5-53-108. Witness bribery.

(a) A person commits witness bribery if he or she:

(1) Offers, confers, or agrees to confer any benefit upon a witness or a person he or she believes may be called as a witness with the purpose of:

(A) Influencing the testimony of that person;

(B) Inducing that person to avoid legal process summoning that person to testify; or

(C) Inducing that person to absent himself or herself from an official proceeding to which that person has been legally summoned; or

(2) Solicits, accepts, or agrees to accept any benefit and the conferring of the benefit is prohibited by this section.

(b) Witness bribery is a Class C felony.

**History.** Acts 1975, No. 280, § 2608;  
A.S.A. 1947, § 41-2608.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Perroni & McNutt, Criminal Contingency Fee Agreements: How Fair Are They?, 16 U. Ark. Little Rock L.J. 211.

## CASE NOTES

## ANALYSIS

**Evidence.**

**Indictment or Information.**

**Testimony Pursuant to Plea Bargain.**

**Evidence.**

Evidence held sufficient to support conviction. *Kerr v. State*, 256 Ark. 738, 512 S.W.2d 13 (1974), cert. denied, 419 U.S. 1110, 95 S. Ct. 783, 42 L. Ed. 2d 806 (1975) (decision under prior law).

Student's testimony that, prior to sexual assault charges being filed, defendant teacher approached him and told him to tell the victim, also a student, that the teacher would give the victim money if she would drop the case, was sufficient to support the teacher's conviction for witness bribery under subdivision (a)(1) of

this section. *Paschal v. State*, 2012 Ark. 127, 388 S.W.3d 429 (2012).

**Indictment or Information.**

Indictment held to be sufficient. *Kirkpatrick v. State*, 177 Ark. 1124, 9 S.W.2d 574 (1928) (decision under prior law).

**Testimony Pursuant to Plea Bargain.**

The trial court properly denied a motion in limine in a murder prosecution which sought to exclude the testimony of a copetrator who had entered into a plea agreement with the state which was conditioned upon his truthful testimony at the defendant's trial on the basis that such testimony would be the result of witness bribery. *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999).

**Cited:** *Clark v. State*, 291 Ark. 405, 725 S.W.2d 550 (1987).

**5-53-109. Intimidating a witness.**

(a) A person commits the offense of intimidating a witness if he or she threatens a witness or a person he or she believes may be called as a witness with the purpose of:

(1) Influencing the testimony of that person;

(2) Inducing that person to avoid legal process summoning that person to testify; or

(3) Inducing that person to absent himself or herself from an official proceeding to which that person has been legally summoned.

(b) Intimidating a witness is a Class C felony.

**History.** Acts 1975, No. 280, § 2609; A.S.A. 1947, § 41-2609.

## CASE NOTES

**Evidence.**

Evidence held sufficient to enable court to find defendant guilty of intimidating witness with a threat of physical force or substantial harm if he testified in criminal proceedings. *McCraw v. State*, 24 Ark. App. 48, 748 S.W.2d 36 (1988).

Substantial evidence supported defendant's conviction for intimidating a witness where, after learning that the wit-

ness told police that she observed defendant's son commit murder, defendant threatened to kill the witness, burn her house down and harm her children; the trial court, sitting as the finder of fact, could have found that defendant threatened the witness with the purpose of influencing her testimony or inducing her not to testify. *Reed v. State*, 91 Ark. App. 267, 209 S.W.3d 449 (2005).

In a case in which defendant appealed his conviction for intimidating a witness, he unsuccessfully argued that the evidence was insufficient to support the conviction because there was no threat communicated since the witness testified that he did not feel threatened by the letter from defendant. This section did not require that the witness feel threatened; it simply required that a threat be communicated with the stated purpose. *Cunningham v. State*, 2010 Ark. App. 130 (2010).

The jury, acting as the fact-finder, weighed the evidence and determined that a letter from defendant to the witness contained a threat intended to influence the witness's testimony; the letter constituted substantial evidence to support defendant's conviction for intimidating a witness. *Cunningham v. State*, 2010 Ark. App. 130 (2010).

### 5-53-110. Tampering.

(a) A person commits the offense of tampering if, believing that an official proceeding or investigation is pending or about to be instituted, he or she induces or attempts to induce another person to:

(1) Testify or inform falsely;

(2) Withhold any unprivileged testimony, information, document, or thing regardless of the admissibility under the rules of evidence of the testimony, information, document, or thing and notwithstanding the relevance or probative value of the testimony, information, document, or thing to an investigation;

(3) Elude legal process summoning that person to testify or supply evidence, regardless of whether the legal process was lawfully issued; or

(4) Absent himself or herself from any proceeding or investigation to which that person has been summoned.

(b) Tampering is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2610; A.S.A. 1947, § 41-2610; Acts 2007, No. 827, § 45.

### RESEARCH REFERENCES

**ALR.** Negligent spoliation of evidence, interfering with prospective civil action, as actionable. 101 A.L.R.5th 61.

Effect of spoliation of evidence in prod-

ucts liability action. 102 A.L.R.5th 99.

Electronic spoliation of evidence. 3 A.L.R.6th 13.

### CASE NOTES

#### ANALYSIS

Applicability.  
False Testimony.

#### Applicability.

Criminal statutes prohibiting tampering with evidence do not impose a duty upon an employer to preserve component parts of a machine which are needed for an employee injured by the machine to maintain an action against the manufac-

turer of the machine. *Wilson v. Beloit Corp.*, 725 F. Supp. 1056 (W.D. Ark. 1989), *aff'd*, 921 F.2d 765 (8th Cir. 1990).

#### False Testimony.

A contract by one person to furnish another any kind of proof that would help him win his case, regardless of whether the testimony was to be true or false, contemplated subornation of perjury. *Luce v. Endsley*, 145 Ark. 287, 224 S.W. 619 (1920) (decision under prior law).



One who induced his wife to make a false affidavit could be guilty of subornation of perjury by inducing her to commit willful and corrupt perjury, and he could not be found guilty unless the wife knew

that the statements in the affidavit were false. *Thomas v. State*, 149 Ark. 68, 231 S.W. 200 (1921) (decision under prior law).

**Cited:** *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990).

### 5-53-111. Tampering with physical evidence.

(a) A person commits the offense of tampering with physical evidence if he or she alters, destroys, suppresses, removes, or conceals any record, document, or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation.

(b)(1) Tampering with physical evidence is a Class D felony if the person impairs or obstructs the prosecution or defense of a felony.

(2) Otherwise, tampering with physical evidence is a Class B misdemeanor.

**History.** Acts 1975, No. 280, § 2611; A.S.A. 1947, § 41-2611.

### RESEARCH REFERENCES

**ALR.** Negligent spoliation of evidence, interfering with prospective civil action, as actionable. 101 A.L.R.5th 61.

Effect of spoliation of evidence in products liability action. 102 A.L.R.5th 99.

Electronic spoliation of evidence. 3 A.L.R.6th 13.

**Ark. L. Rev.** Note, Altered or Absent Evidence: The Tort of Spoliation: *Wilson v. Beloit Corp.*, 43 Ark. L. Rev. 453.

Comment, To the Spoliator Go the Spoils: Arkansas Rejects Spoliation of Evidence as a Tort Cause of Action, 61 Ark. L. Rev. 283.

### CASE NOTES

#### ANALYSIS

Constitutionality.

Applicability.

Double Jeopardy.

Evidence.

Intent.

Misdemeanor.

#### Constitutionality.

The mere existence of overlapping provisions in this section and § 5-54-105 does not render either statute constitutionally infirm; there appears to be no impermissible uncertainty in the definitions of the respective offenses. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

#### Applicability.

Criminal statutes prohibiting tampering with evidence do not impose a duty upon an employer to preserve component parts of a machine which are needed for an employee injured by the machine to

maintain an action against the manufacturer of the machine. *Wilson v. Beloit Corp.*, 921 F. Supp. 1056 (W.D. Ark. 1989), *aff'd*, 921 F.2d 765 (8th Cir. 1990).

Trial court properly dismissed administratrix's tort claim for a third-party's alleged spoliation of the evidence in a wrongful death suit because a remedy had to be sought through a means other than an individual tort claim; criminal sanctions were still available under this section, even though a new tort was not recognized, and attorneys who were guilty of spoliation were still subject to discipline. *Downen v. Redd*, 367 Ark. 551, 242 S.W.3d 273 (2006).

#### Double Jeopardy.

Where the charges of breaking and entering and tampering with physical evidence were based upon the same elements, the two felonies were merged into one, and defendant could only be convicted of one offense; thus, defendant's conviction for

tampering with physical evidence was affirmed and his conviction for breaking or entering was reversed and dismissed. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

**Evidence.**

Evidence held sufficient to support conviction. *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981).

Trial court did not err in convicting defendant of misdemeanor tampering with physical evidence because there was sufficient evidence to support the jury's verdict that defendant tampered with the physical evidence when he threw the drugs into the toilet to flush them with the purpose of impairing the availability of the drugs for use in prosecution, and the fact that defendant did not actually impair or obstruct the prosecution was why he was not convicted of a felony; by defendant's own admission, he was given the drugs to flush down the toilet when the police were seen approaching the house, and he took the drugs to the bathroom and threw them into the toilet but did not succeed in flushing them. *Singleton v. State*, 2011 Ark. App. 145, 381 S.W.3d 874 (2011).

Defendant's conviction for tampering with evidence, in violation of subsection (a) of this section, was supported by the evidence because the state produced substantial evidence that defendant altered

the position of a murder victim's body and the murder weapon with the purpose of impairing the investigation into her death. *Shatwell v. State*, 2013 Ark. App. 568, 430 S.W.3d 142 (2013).

Substantial evidence did not support defendant's conviction for tampering with physical evidence because the evidence failed to exclude every other reasonable hypothesis, and the jury had to speculate that defendant's confession was actually properly recorded and later removed, that the device did not malfunction, and that defendant deleted and added recordings; there was no direct evidence that defendant ever touched the digital recorder. *Hartman v. State*, 2015 Ark. 30, 454 S.W.3d 721 (2015).

**Intent.**

Evidence held sufficient to support a finding of intent to tamper with the evidence. *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981).

**Misdemeanor.**

Evidence held insufficient to find that the defendant impaired the prosecution of a felony as prohibited by this section, so conviction had to be reduced to misdemeanor tampering with evidence. *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981).

**Cited:** *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990).

**5-53-112. Retaliation against a witness, informant, or juror.**

(a) A person commits the offense of retaliation against a witness, informant, or juror if he or she harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of witness, informant, or juror.

(b) Retaliation against a witness, informant, or juror is a Class D felony.

(c) "Informant" means a person who provides information to any law enforcement agency in an effort to assist the law enforcement agency in solving a crime or apprehending a person suspected of a criminal offense.

**History.** Acts 1975, No. 280, § 2612; A.S.A. 1947, § 41-2612; Acts 1997, No. 1238, § 1; 2005, No. 1994, § 465.

## RESEARCH REFERENCES

**Ark. L. Notes.** Flaccus, The Employment-at-Will Doctrine — The Report of Its Death Has Been Much Exaggerated, 1989 Ark. L. Notes 15.

**U. Ark. Little Rock L.J.** Note, Labor

— Employment at Will — Public Policy Exception Recognized, *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), 11 U. Ark. Little Rock L.J. 617.

## CASE NOTES

## ANALYSIS

Applicability.

Public Policy.

**Applicability.**

The public policy exception to the at-will-employment doctrine does not embrace the claim of an employee fired for threatening to undermine an employer's

private, contractual relationships. *Sk-rable v. Saint Vincent Infirmary*, 57 Ark. App. 164, 943 S.W.2d 236 (1997).

**Public Policy.**

Public policy of the state is contravened if an employer discharges an employee for reporting a violation of state or federal law. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988).

**5-53-113. Juror bribery.**

(a) A person commits juror bribery if he or she:

(1) Offers, confers, or agrees to confer any benefit upon a juror with the purpose of influencing the juror's vote, decision, or other action as a juror; or

(2) Solicits, accepts, or agrees to accept any benefit and the receipt of the benefit is prohibited by this section.

(b) Juror bribery is a Class C felony.

**History.** Acts 1975, No. 280, § 2613; A.S.A. 1947, § 41-2613.

**5-53-114. Intimidating a juror, a witness, or an informant.**

(a) A person commits the offense of intimidating a juror, a witness, or an informant if he or she threatens a juror, a witness, or an informant with the purpose of influencing the juror's vote or decision or the witness's or informant's statement or testimony.

(b) Intimidating a juror, a witness, or an informant is a Class C felony.

(c) "Informant" means a person who provides information to any law enforcement agency in an effort to assist the law enforcement agency in solving crimes and apprehending persons suspected of criminal offenses.

**History.** Acts 1975, No. 280, § 2614; A.S.A. 1947, § 41-2614; Acts 2005, No. 1994, § 466.



**5-53-115. Jury tampering.**

(a) A person commits the offense of jury tampering if he or she attempts directly or indirectly to communicate with a juror, other than as a part of the official proceedings in which the juror is participating, with the purpose of influencing the juror's vote, decision, or other action as a juror.

(b) Juror tampering is a Class D felony.

**History.** Acts 1975, No. 280, § 2615; A.S.A. 1947, § 41-2615.

**CASE NOTES****ANALYSIS**

Civil Remedy.  
Double Jeopardy.  
Sufficient Evidence.

**Civil Remedy.**

The former jury tampering statute was not intended to also create a civil remedy and such a remedy could not be implied. *Jones v. United States*, 401 F. Supp. 168 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. Ark. 1976) (decision under prior law).

**Double Jeopardy.**

Defendant's conviction for jury tampering did not violate the United States Constitution or the Arkansas Constitution because, even if contempt was a lesser-included offense of jury tampering, there

was no indication that defendant was punished for contempt when he was held in contempt for the "time being" and taken into custody; a hearing was not held, an order of contempt was not entered, and defendant was not punished. *Whitt v. State*, 2015 Ark. App. 529, 471 S.W.3d 670 (2015).

**Sufficient Evidence.**

Evidence was sufficient to support a conviction for jury tampering because the statements that defendant made about his girlfriend related to a domestic disturbance, which resulted in the original charges against defendant. The conversation about defendant's girlfriend was evidence of his intent to influence the juror's vote. *Whitt v. State*, 2015 Ark. App. 529, 471 S.W.3d 670 (2015).

**5-53-116. Simulating legal process.**

(a) A person commits the offense of simulating legal process if, with the purpose of obtaining anything of value, he or she knowingly delivers or causes to be delivered to another a request, demand, or notice that simulates any legal process issued by any court of this state.

(b) Simulating legal process is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2616; A.S.A. 1947, § 41-2616.

**5-53-117 — 5-53-129. [Reserved.]****5-53-130. [Repealed.]**

**Publisher's Notes.** This section, concerning indictments for perjury, was repealed by Acts 2005, No. 1994, § 542. The section was derived from Rev. Stat., ch. 44,

div. 5, art. 1, § 7; C. & M. Dig., § 2590; Pope's Dig., § 3278; A.S.A. 1947, § 41-2657.

**5-53-131. Frivolous, groundless, or malicious prosecutions.**

Any officer or any person who knowingly brings or aids and encourages another to bring a frivolous, groundless, or malicious prosecution is guilty of a Class A misdemeanor.

**History.** Acts 1871, No. 31, § 5, p. 96; A.S.A. 1947, § 41-2651; Acts 2005, No. C. & M. Dig., § 2765; Pope's Dig., § 3470; 1994, § 452.

**CASE NOTES****Applicability.**

Statute making it a misdemeanor for an officer to bring or aid others to bring malicious prosecutions is a criminal stat-

ute and does not apply to torts committed by city officers. *Springfield v. Carter*, 175 F.2d 914 (8th Cir. 1949).

**5-53-132. Misconduct in selecting or summoning jurors.**

Any person whose duty it is to select or summon any jurors in any court or before any officer who is guilty of any unlawful, partial, or improper conduct in selecting or summoning any juror is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100).

**History.** Rev. Stat., ch. 44, div. 5, art. 2, § 3245; A.S.A. 1947, § 41-2652; Acts § 5; C. & M. Dig., § 2565; Pope's Dig., 2005, No. 1994, § 50.

**5-53-133. Approaching jury commissioners to influence juror selections.**

(a)(1) It is unlawful for any person to approach any jury commissioner for the purpose of having any person placed upon a grand jury or petit jury after the circuit judges of any district in this state have appointed jury commissioners to select grand jurors and petit jurors to serve in the circuit courts of this state.

(2) Any person violating this subsection is guilty of a Class D felony.

(b) If any state, county, city, or township official approaches any jury commissioner for the purpose of having any person placed upon the grand jury or petit jury, he or she is guilty of a Class D felony.

(c) If any licensed attorney approaches any jury commissioner for the purpose of having any person placed upon the grand jury or petit jury, he or she is guilty of a Class D felony.

(d) It is the duty of the circuit judges to instruct jury commissioners in regard to the provisions of this section.

**History.** Acts 1941, No. 365, §§ 1-4; 2653 — 41-2656; Acts 1995, No. 1296, § 6; 1951, No. 358, §§ 4-6; A.S.A. 1947, §§ 41- 2005, No. 1994, § 425.

**5-53-134. Violation of an order of protection.**

(a)(1) A person commits the offense of violation of an order of protection if:

(A) A circuit court or other court with competent jurisdiction has issued a temporary order of protection or an order of protection against the person pursuant to the Domestic Abuse Act of 1991, § 9-15-101 et seq.;

(B) The person has received actual notice or notice pursuant to the Arkansas Rules of Civil Procedure of a temporary order of protection or an order of protection pursuant to the Domestic Abuse Act of 1991, § 9-15-101 et seq.; and

(C) The person knowingly violates a condition of an order of protection issued pursuant to the Domestic Abuse Act of 1991, § 9-15-101 et seq.

(2) A person commits the offense of violation of an out-of-state order of protection if:

(A) The court of another state, a federally recognized Indian tribe, or a territory with jurisdiction over the parties and matters has issued a temporary order of protection or an order of protection against the person pursuant to the laws or rules of the other state, federally recognized Indian tribe, or territory;

(B) The person has received actual notice or other lawful notice of a temporary order of protection or an order of protection pursuant to the laws or rules of the other state, the federally recognized Indian tribe, or the territory;

(C) The person knowingly violates a condition of an order of protection issued pursuant to the laws or rules of the other state, the federally recognized Indian tribe, or the territory; and

(D) The requirements of § 9-15-302 concerning the full faith and credit for an out-of-state order of protection have been met.

(b)(1) Except as provided in subdivision (b)(2) of this section, violation of an order of protection under this section is a Class A misdemeanor.

(2) Violation of an order of protection under this section is a Class D felony if:

(A) The offense is committed within five (5) years of a previous conviction for violation of an order of protection under this section;

(B) The order of protection was issued after a hearing of which the person received actual notice and at which the person had an opportunity to participate; and

(C) The facts constituting the violation on their own merit satisfy the elements of any felony offense or misdemeanor offense, not including an offense provided for in this section.

(c)(1) A law enforcement officer may arrest and take into custody without a warrant any person who the law enforcement officer has probable cause to believe:

(A) Is subject to an order of protection issued pursuant to the laws of this state; and



(B) Has violated the terms of the order of protection, even if the violation did not take place in the presence of the law enforcement officer.

(2) Under § 9-15-302, a law enforcement officer or law enforcement agency may arrest and take into custody without a warrant any person who the law enforcement officer or law enforcement agency has probable cause to believe:

(A) Is subject to an order of protection issued pursuant to the laws or rules of another state, a federally recognized Indian tribe, or a territory; and

(B) Has violated the terms of the out-of-state order of protection, even if the violation did not take place in the presence of the law enforcement officer.

(d) It is an affirmative defense to a prosecution under this section if:

(1) The parties have reconciled prior to the violation of the order of protection; or

(2) The petitioner for the order of protection:

(A) Invited the defendant to come to the petitioner's residence or place of employment listed in the order of protection; and

(B) Knew that the defendant's presence at the petitioner's residence or place of employment would be in violation of the order of protection.

(e) Any law enforcement officer acting in good faith and exercising due care in making an arrest for domestic abuse in an effort to comply with this subchapter shall have immunity from civil or criminal liability.

**History.** Acts 1991, No. 267, § 1; 1991, No. 1236, § 1; 2003, No. 651, § 4; 2009, No. 331, § 1; 2011, No. 810, § 1.

**Amendments.** The 2011 amendment added (d)(2).

**Cross References.** Filing cost for domestic violence charges or petitions, § 5-26-310, 9-15-202.

Full faith and credit for out-of-state protection orders, § 9-15-302.

## CASE NOTES

### ANALYSIS

Criminal Jurisdiction.

Evidence Sufficient.

### Criminal Jurisdiction.

Trial court had no subject-matter jurisdiction to try defendant for the crime of violation of a protective order under § 9-15-207 because that statute did not describe a criminal offense, which was described in this section, and only provided a mechanism by which a person could obtain injunctive and equitable relief for protection against domestic abuse. *Standridge v. State*, 2014 Ark. 515, 452 S.W.3d 103 (2014).

### Evidence Sufficient.

Evidence was sufficient to support a conviction for stalking and a violation of an order of protection because the content and timing of text messages connected them to defendant through circumstantial evidence; the messages contained a daughter's nickname, names of people of whom defendant was jealous, and references to reconciliation with defendant's former wife. Moreover, one message was sent immediately after defendant was served with an order of protection. *Brawner v. State*, 2013 Ark. App. 413, 428 S.W.3d 600 (2013).

**Cited:** *West v. State*, 82 Ark. App. 165, 120 S.W.3d 100 (2003); *Standridge v.*

State, 2012 Ark. App. 563, 423 S.W.3d 677 (2012).

## **SUBCHAPTER 2 — THREATENING A JUDICIAL OFFICIAL OR JUROR**

### **SECTION.**

5-53-201. Definitions.

5-53-202. Threatening a judicial official  
or juror — Penalty.

### **5-53-201. Definitions.**

As used in this subchapter:

- (1) “Immediate family” means the spouse or child of a judicial official or juror;
- (2) “Judicial official” means any:
  - (A) District judge, circuit judge, or Court of Appeals judge;
  - (B) Supreme Court Justice; or
  - (C) Person authorized to hear evidence under oath; and
- (3) “Juror” means any citizen of the state impaneled as a grand juror or petit juror.

**History.** Acts 2003, No. 1313, § 1.

### **RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Threatening Judicial Officer or Juror, 26 U. Ark. Little Rock L. Rev. 364.

### **5-53-202. Threatening a judicial official or juror — Penalty.**

(a) A person commits the offense of threatening a judicial official or juror if the person directly or indirectly utters or otherwise makes a threat toward another person whom the person knows or should know to be a:

- (1) Judicial official;
- (2) Juror; or
- (3) Member of the immediate family of a judicial official or juror.

(b)(1) Threatening a judicial official or juror is a Class B felony if the person threatens:

(A) To cause death or serious physical injury to a judicial official, juror, or any member of a judicial official’s or juror’s immediate family; or

(B) Substantial damage to property owned or possessed by a judicial official, juror, or any member of a judicial official’s or juror’s immediate family.

(2) Threatening a judicial official or juror is a Class C felony if the person threatens:

(A) To cause physical injury to a judicial official, juror, or any member of a judicial official’s or juror’s immediate family; or

(B) Damage to property owned or possessed by a judicial official, juror, or any member of a judicial official's or juror's immediate family.

(c) It is an affirmative defense to any prosecution under this subchapter that at the time the defendant engaged in the conduct, the threat did not relate to the person's status or actions as a:

- (1) Judicial official;
- (2) Juror; or
- (3) Member of the immediate family of a judicial official or juror.

**History.** Acts 2003, No. 1313, § 2.

## CHAPTER 54

### OBSTRUCTING GOVERNMENTAL OPERATIONS

#### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. TERRORISM.

**Publisher's Notes.** For Comments regarding the Criminal Code, see Commentaries Volume B.

Because of the enactment of Subchapter 2 of this chapter by Acts 2003, No. 1342, the provisions of this chapter existing before that act have been designated as Subchapter 1.

**Cross References.** Escape or rescue

after arrest, right to recapture, reward, § 16-81-112.

Fines, § 5-4-201.

Notice of escapes to law enforcement officers, § 12-29-113.

Notice of escape to victim or victim's next of kin, § 12-29-114.

Term of imprisonment, § 5-4-401.

#### RESEARCH REFERENCES

**ALR.** Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted. 3 A.L.R.4th 1085.

**Am. Jur.** 5 Am. Jur. 2d, Arrest, § 84.

27A Am. Jur. 2d, Escape, § 1 et seq.

58 Am. Jur. 2d, Obst. Jus., § 1 et seq.

**Ark. L. Rev.** 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

**C.J.S.** 30A C.J.S., Escape, § 1 et seq.

67 C.J.S., Obst. Jus., § 1 et seq.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Criminal Law, 1 U. Ark. Little Rock L.J. 153.

Survey of Arkansas Law: Criminal Law, 4 U. Ark. Little Rock L.J. 189.

## SUBCHAPTER 1 — GENERAL PROVISIONS

#### SECTION.

5-54-101. Definitions.

5-54-102. Obstructing governmental operations.

5-54-103. Resisting arrest — Refusal to submit to arrest.

#### SECTION.

5-54-104. Interference with a law enforcement or code enforcement officer.

5-54-105. Hindering apprehension or prosecution.



## SECTION.

- 5-54-106. Aiding consummation of offense.
- 5-54-107. Compounding.
- 5-54-108. Hindering prosecution and compounding — No defense.
- 5-54-109. Refusing to assist law enforcement officer.
- 5-54-110. First degree escape.
- 5-54-111. Second degree escape.
- 5-54-112. Third degree escape.
- 5-54-113. Permitting escape in the first degree.
- 5-54-114. [Repealed.]
- 5-54-115. Permitting escape or unauthorized departure in the second degree.
- 5-54-116. Aiding an unauthorized departure.
- 5-54-117. Assisting in or furnishing an implement for escape.

## SECTION.

- 5-54-118. Furnishing implement for unauthorized departure.
- 5-54-119. Furnishing, possessing, or using prohibited articles.
- 5-54-120. Failure to appear.
- 5-54-121. Tampering with a public record.
- 5-54-122. Filing false report with law enforcement agency.
- 5-54-123, 5-54-124. [Reserved.]
- 5-54-125. Fleeing.
- 5-54-126. Killing or injuring animals used by law enforcement or search and rescue dogs.
- 5-54-127. [Repealed.]
- 5-54-128. [Repealed.]
- 5-54-129. Search of persons and vehicles entering institutions.
- 5-54-130. Radio voice privacy adapters.
- 5-54-131. Absconding.
- 5-54-132. Projecting a laser light on a law enforcement officer.

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**Effective Dates.** Acts 1953, No. 88, § 5: Feb. 18, 1953. Emergency clause provided: "Whereas, it has been found by the Legislature that visitors or other persons entering places where prisoners are confined are carrying firearms, explosives, intoxicating beverages, narcotics, barbiturates, marijuana, benzedrene, or other stimulants, to inmates and that such action threatened the peace, safety and discipline of said penitentiary, farm, jail or institution, and that this Act will provide for greater peace, safety and discipline in said penitentiary, farm, jail, or institution. Therefore, an emergency is declared to exist and this Act being necessary for the public peace, health and safety shall take effect and be in full force from the date of its approval."

Acts 1975, No. 973, § 6: Apr. 9, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that the private ownership and use of equipment designed for and used to receive and decode messages or communications sent through voice privacy adapters by law enforcement agencies is capable of seriously hampering the effective administration of law; that such equipment is relatively inexpensive and is available to anyone desiring to purchase

the same; that such equipment can be used by law violators to avoid apprehension by law enforcement officers; that it is essential to the proper and effective enforcement of the laws of this State and to the safety and well-being of the law abiding citizens of the State that private ownership of such equipment be prohibited; that this Act is designed to prohibit such private ownership and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 686, § 3: Mar. 27, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the penalties prescribed in the present law are inadequate to deter introduction of prohibited articles in certain facilities; that this act is designed to correct this deficiency and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 1049, § 3: Apr. 17, 1985. Emergency clause provided: "It is hereby

found and determined by the General Assembly that stiffer penalties are needed to thwart persons who assist inmates of correctional facilities in escape attempts. Therefore, this Act is immediately necessary to aid law enforcement personnel and prosecutors. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1988 (4th Ex. Sess.), No. 8, § 4 and No. 23, § 4: July 15, 1988. Emergency

clause provided: "It is hereby found and determined by the General Assembly that the present provisions do not allow persons incarcerated in the Department of Correction to properly exercise their religious beliefs. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

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### 5-54-101. Definitions.

As used in this subchapter:

(1) "Arkansas State Hospital" includes any subdivision or facility of the Arkansas State Hospital and any other hospital established by law or legally designated for similar purposes;

(2)(A) "Correctional facility" means any place used for the confinement of persons charged with or convicted of an offense or otherwise confined under a court order.

(B) "Correctional facility" does not include youth services programs and applies to the Arkansas State Hospital only as to persons detained there charged with or convicted of an offense;

(3)(A) "Custody" means actual or constructive restraint by a law enforcement officer pursuant to an arrest or a court order.

(B) "Custody" does not include detention in a correctional facility, youth services program, or the Arkansas State Hospital;

(4) "Deadly physical force" means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury;

(5) "Escape" means the unauthorized departure of a person from custody or a correctional facility;

(6) "Governmental function" means any activity that a public servant is legally authorized to undertake on behalf of any governmental unit he or she serves;

(7) "Implement for escape" means any weapon, tool, or other thing that may be useful for escape;

(8) "Implement for unauthorized departure" means any weapon, tool, or other thing that may be useful for unauthorized departure;

(9) "Juvenile detention facility" means any facility for the temporary care of juveniles alleged to be delinquent, or adjudicated delinquent and awaiting disposition, who require secure custody in a physically restricting facility designed and operated with all entrances and exits under the exclusive control of the facility's staff, so that a juvenile may not leave the facility unsupervised or without permission;

(10) "Physical force" means any bodily impact, restraint, or confinement or the threat of bodily impact, restraint, or confinement;

(11) "Prohibited article" means:

(A) An intoxicating beverage other than sacramental wine labeled as sacramental wine and supplied by a religious official who supplies the sacramental wine to an inmate in the Department of Correction or Department of Community Correction for the sole purpose of an approved religious service, pursuant to rules and regulations promulgated by the Board of Corrections;

(B) A controlled substance, as defined by §§ 5-64-101 et seq. — 5-64-601 et seq., not prescribed by a physician for the benefit of the person to whom it is delivered;

(C) A weapon, including a firearm or anything manifestly designed, made, adapted, or capable of being adapted to inflict physical injury, and anything that in the manner of its use or intended use is capable of causing physical injury; or

(D) Anything furnished an inmate in a correctional facility, the Arkansas State Hospital, or juvenile training school without authorization of a person charged with the duty of maintaining the safety or security of the institution or any person confined in the institution;

(12) "Public record" includes all official books, papers, exhibits, or records of any type required by law to be created by or received and retained in any governmental office or agency, affording notice or information to the public or constituting a memorial of an act or transaction of a public office or public servant; and

(13)(A) "Youth services program" means a residential program operated by the Division of Youth Services of the Department of Human Services or its contractor for the purpose of detaining, housing, and treating persons committed to the division.

(B) A person committed to the division and placed in a youth services program is in the custody of the youth services program while attending or participating in any activity conducted or arranged by the youth services program, regardless of the physical location of the activity.

**History.** Acts 1975, No. 280, § 2801; 1988 (4th Ex. Sess.), No. 23, § 1; 1997, No. 1977, No. 360, § 13; A.S.A. 1947, § 41-1229, §§ 1, 2; 1997, No. 1299, §§ 1, 2; 2801; Acts 1988 (4th Ex. Sess.), No. 8, § 1; 2005, No. 1994, § 253.

## CASE NOTES

### ANALYSIS

Correctional Facility.

Escape.

Governmental Function.

Public Record.

### Correctional Facility.

A holding cell which was located in a county courthouse and was used as a

temporary facility to hold prisoners before and after their appearances in court constituted a correctional facility. *Glover v. State*, 8 Ark. App. 104, 648 S.W.2d 824 (1983).

### Escape.

Where the defendant forged a court order which declared his convictions void, there was sufficient evidence to sustain a



guilty verdict for second degree escape, and the Attorney General's statement that the order was valid did not legitimize the fraudulent order. *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986).

#### **Governmental Function.**

Vehicle passenger, who was allegedly arrested by a state police officer for refusing to provide identification, stated a claim against the officer for a Fourth Amendment violation. There was no probable cause to arrest the passenger under § 5-54-102(a)(1) for obstructing the performance of a governmental function; the officer's authority under Ark. R. Crim. P. 2.2 to request information did not establish a "governmental function" within the

meaning of subdivision (6) of this section because there was no showing that the passenger had a duty under Arkansas law to furnish identification. *Stufflebeam v. Harris*, 521 F.3d 884 (8th Cir. 2008).

#### **Public Record.**

A defendant's handwritten documentation fit squarely into the subdivision (11) [former] definition of a public record, as a matter of law. *Williams v. State*, 346 Ark. 304, 57 S.W.3d 706 (2001).

**Cited:** *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977); *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999); *Kelley v. State*, 75 Ark. App. 144, 55 S.W.3d 309 (2001); *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

### **5-54-102. Obstructing governmental operations.**

(a) A person commits the offense of obstructing governmental operations if the person:

(1) Knowingly obstructs, impairs, or hinders the performance of any governmental function;

(2) Knowingly refuses to provide information requested by an employee of a governmental agency relating to the investigation of a case brought under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq., and is the physical custodian of the child in the case;

(3) Fails to submit to court-ordered scientific testing by a noninvasive procedure to determine the paternity of a child in a case brought under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq.; or

(4) Falsely identifies himself or herself to a law enforcement officer or a code enforcement officer.

(b)(1) Obstructing governmental operations by using or threatening to use physical force is a Class A misdemeanor.

(2) A second or subsequent offense of obstructing governmental operations under subdivision (a)(4) of this section is a Class A misdemeanor.

(3) Otherwise, obstructing governmental operations is a Class C misdemeanor.

(c) This section does not apply to:

(1) Unlawful flight by a person charged with an offense;

(2) Refusal to submit to arrest;

(3) Any means of avoiding compliance with the law not involving affirmative interference with a governmental function unless specifically set forth in this section; or

(4) Obstruction, impairment, or hindrance of what a person reasonably believes is a public servant's unlawful action.

(d)(1) As used in this section, "code enforcement officer" means an individual charged with the duty of enforcing a municipal code, municipi-

pal ordinance, or municipal regulation as defined by a municipal code, municipal ordinance, or municipal regulation.

(2) “Code enforcement officer” includes a municipal animal control officer.

**History.** Acts 1975, No. 280, § 2802; 1994, § 453; 2007, No. 163, § 1; 2009, No. A.S.A. 1947, § 41-2802; Acts 1995, No. 342, § 1; 2009, No. 748, § 25. 1182, § 1; 1999, No. 577, § 1; 2005, No.

## RESEARCH REFERENCES

**ALR.** Criminal and Civil Liability of Recording of Police Actions. 84 A.L.R.6th Civilians and Police Officers Concerning 89.

## CASE NOTES

### ANALYSIS

Evidence Held Insufficient.  
Evidence Held Sufficient.  
Search and Seizure.

### Evidence Held Insufficient.

Where arrestee who sued police officer and city under 42 U.S.C. § 1983 alleged that he was arrested merely because (1) he watched the police officer as he spoke with two young men from a distance, (2) during the incident arrestee spoke only when spoken to, and (3) arrestee complied with a request for identification, and where police officer admitted some of those facts but asserted that arrestee was arrested only after he refused to move, the court properly denied officer summary judgment based on qualified immunity; under those circumstances, no officer reasonably could have believed he had probable cause to arrest the arrestee for obstruction of justice or any other offense. *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005).

### Evidence Held Sufficient.

Evidence that defendant exited his residence and began screaming at officers who were investigating a possible drunk driver who had been stopped in defendant’s driveway, causing the suspect to stop co-

operating with the police investigation, was sufficient to support defendant’s conviction of obstructing governmental operations. *Kelley v. State*, 75 Ark. App. 144, 55 S.W.3d 309 (2001).

Obstruction adjudication was supported by the evidence, because the juvenile was given a lawful command to return to his room by a law-enforcement officer and failed to abide by it. *R.B. v. State*, 2013 Ark. App. 377 (2013).

### Search and Seizure.

Vehicle passenger, who was allegedly arrested by a state police officer for refusing to provide identification, stated a claim against the officer for a Fourth Amendment violation. There was no probable cause to arrest the passenger under subdivision (a)(1) of this section for obstructing the performance of a governmental function; the officer’s authority under Ark. R. Crim. P. 2.2 to request information did not provide probable cause because there was no showing that the passenger had a duty under Arkansas law to furnish identification. *Stufflebeam v. Harris*, 521 F.3d 884 (8th Cir. 2008).

**Cited:** *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987); *Nelson v. State*, 2013 Ark. App. 421 (2013).

## 5-54-103. Resisting arrest — Refusal to submit to arrest.

(a)(1) A person commits the offense of resisting arrest if he or she knowingly resists a person known by him or her to be a law enforcement officer effecting an arrest.

(2) As used in this subsection, “resists” means using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person.

(3) It is no defense to a prosecution under this subsection that the law enforcement officer lacked legal authority to make the arrest if the law enforcement officer was acting under color of his or her official authority.

(4) Resisting arrest is a Class A misdemeanor.

(b)(1) A person commits the offense of refusal to submit to arrest if he or she knowingly refuses to submit to arrest by a person known by him or her to be a law enforcement officer effecting an arrest.

(2) As used in this subsection, “refuses” means active or passive refusal.

(3) It is no defense to a prosecution under this subsection that the law enforcement officer lacked legal authority to make the the arrest if the law enforcement officer was acting under color of his or her official authority.

(4) Refusal to submit to arrest is a Class B misdemeanor.

**History.** Acts 1975, No. 280, § 2803; A.S.A. 1947, § 41-2803; Acts 1987, No. 261, § 1.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Acts Constituting Offense.  
Defense.  
Evidence.  
Indictment or Information.  
Law Enforcement Officer.  
Lesser-Included Offenses.  
Remedies.  
Resistance.  
Resistance or Interference.  
Validity of Process.

### Constitutionality.

A reasonable and commonly understood construction of subsection (b) gives a person of ordinary intelligence fair warning that an inactive or passive form of non-compliance with the arrest process can subject one to punishment, and this section is not unconstitutionally vague. *Pursley v. State*, 302 Ark. 471, 791 S.W.2d 359 (1990).

Defendant failed to show that subsection (b) unconstitutionally violated his freedom of speech rights, as it is written or as it was applied to him. *Williams v. State*, 320 Ark. 211, 895 S.W.2d 913 (1995).

### Acts Constituting Offense.

Defendant who became involved in a police station brawl should have been charged with resisting arrest or disorderly conduct, not with interfering with a police officer in the performance of his duties. *Breakfield v. State*, 263 Ark. 398, 566 S.W.2d 729 (1978).

Defendant's actions held not to support his conviction for interfering with a police officer in the performance of his duties, although they may have constituted the offense of resisting arrest. *State v. Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980).

### Defense.

Defendant committed an assault with a deadly weapon when he shot police officer who was trying to arrest his brother for drunkenness, and it was no excuse that police officer advanced toward defendant, as police officer had a right to disarm the defendant. *Ogles v. State*, 214 Ark. 581, 217 S.W.2d 259 (1949) (decision under prior law).

### Evidence.

Evidence held sufficient to support conviction. *Williams v. State*, 70 Ark. 393, 68 S.W. 241 (1902); *Williams v. State*, 253



Ark. 973, 490 S.W.2d 117 (1973); *Hammond v. State*, 255 Ark. 56, 498 S.W.2d 652 (1973) (preceding decisions under prior law).

Evidence held sufficient where it was shown that the defendant continuously struggled with the arresting officers when they attempted to place handcuffs on him and that he repeatedly swung at them and attempted to kick them. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

In a case in which defendant appealed the revocation of her suspended sentence, defendant challenged the sufficiency of the evidence supporting the finding that she committed the new offense of battery in the second degree on a police officer; however, the appellate court did not address defendant's argument because the evidence introduced at the revocation hearing was sufficient to support the finding that defendant committed the offense of resisting arrest. *Gasca v. State*, 2013 Ark. App. 214 (2013).

### **Indictment or Information.**

In drawing an indictment for obstructing or resisting an officer, it was not necessary to allege that the officer seeking to arrest certain parties had a warrant for their arrest. *State v. Embrey*, 135 Ark. 262, 204 S.W. 1139 (1918) (decision under prior law).

### **Law Enforcement Officer.**

Though the patrolman was off duty at the time of arrest, defendant was guilty of resisting arrest. *Meyers v. State*, 253 Ark. 38, 484 S.W.2d 334 (1972) (decision under prior law).

### **Lesser-Included Offenses.**

Aggravated and first degree assault are not lesser-included offenses of resisting arrest. *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

### **Remedies.**

Consistent with the legislative purpose for this section, defendant's remedy for any violation of his constitutional rights stemming from his arrest was to submit his dispute to the impartial determination of a court of law, including, if appropriate, an action for damages; his remedy was not to refuse to submit to his arrest. *Williams v. State*, 320 Ark. 211, 895 S.W.2d 913 (1995).

### **Resistance.**

The use of any means, whether threats, intimidations, or any other act willfully done, with intent to deter, hinder or prevent an officer from the performance of his duty constituted a violation of former section concerning obstructing or resisting an officer. *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973) (decision under prior law).

Arrest was not complete at the moment handcuffs were put on defendants, who were in the process of committing the offense of criminal trespass when the officers handcuffed them, and would not move and continued to commit the trespass even after the handcuffs were secured. As a result, the arrest was not complete until the continuing trespass offense was ended, and the defendants, by refusing to move, were passively refusing to submit to arrest. *Pursley v. State*, 302 Ark. 471, 791 S.W.2d 359 (1990).

The use of physical force is not required to sustain a conviction; a threat of physical force is sufficient. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

### **Resistance or Interference.**

The distinction between resisting arrest and interference with a law enforcement officer as defined in § 5-54-104 is that resisting the officer occurs when one knowingly resists a person known by him to be a law enforcement officer attempting to effect an arrest, while the interference referred to in § 5-54-104 is designed to cover the situation where a person is interfering with an officer performing some duty other than arresting the person charged. *Gilmer v. State*, 269 Ark. 30, 602 S.W.2d 406 (1980).

The offense of interference with a police officer was not intended to be an alternative to charging someone with resisting arrest. *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982).

### **Validity of Process.**

Validity of the criminal process, regular on its face, was immaterial. *Crabtree v. State*, 238 Ark. 358, 381 S.W.2d 729 (1964) (decision under prior law).

**Cited:** *Delrio v. State*, 263 Ark. 888, 568 S.W.2d 15 (1978); *Duckins v. State*, 271 Ark. 658, 609 S.W.2d 674 (Ct. App. 1980); *Easterly v. State*, 8 Ark. App. 135, 648 S.W.2d 843 (1983); *Bell v. Lockhart*,

741 F.2d 1105 (8th Cir. 1984); *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991); *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992); *Williams v. State*, 327 Ark. 97, 938 S.W.2d 547 (1997).

**5-54-104. Interference with a law enforcement or code enforcement officer.**

(a)(1) A person commits the offense of interference with a law enforcement officer if he or she knowingly employs or threatens to employ physical force against a law enforcement officer engaged in performing his or her official duties.

(2) A person commits the offense of interference with a code enforcement officer if he or she knowingly employs or threatens to employ physical force against a code enforcement officer engaged in performing his or her official duties.

(b)(1) Interference with a law enforcement officer or a code enforcement officer is a Class C felony if:

(A) The person uses or threatens to use deadly physical force; or

(B) The person is assisted by one (1) or more other persons and physical injury to the law enforcement officer or code enforcement officer results.

(2) Otherwise, interference with a law enforcement officer or a code enforcement officer is a Class A misdemeanor.

(c)(1) As used in this section, “code enforcement officer” means an individual charged with the duty of enforcing a municipal code, municipal ordinance, or municipal regulation as defined by a municipal code, municipal ordinance, or municipal regulation.

(2) “Code enforcement officer” includes an animal control officer.

**History.** Acts 1975, No. 280, § 2804; 1977, No. 360, § 14; A.S.A. 1947, § 41-2804; Acts 2009, No. 343, § 1.

**RESEARCH REFERENCES**

**ALR.** Criminal and Civil Liability of Recording of Police Actions. 84 A.L.R.6th Civilians and Police Officers Concerning 89.

**CASE NOTES**

**ANALYSIS**

Applicability.  
Acts Constituting Offense.  
Evidence.  
Justification.  
Performance of Official Duties.  
Resistance or Interference.  
Search Warrant.  
Separate Offenses.

**Applicability.**

Former section providing penalty for obstructing or resisting an officer applied to knowing and willful obstruction of or resistance to an officer in the discharge of any official duty. *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973) (decision under prior law).

This section is not applicable when one resists his arrest. *State v. Bocksnick*, 268

Ark. 74, 593 S.W.2d 176 (1980).

The offense of interference applies only where a police officer is interfered with in the performance of his duty by someone other than whom the officer is trying to arrest; the offense of interference with a police officer was not intended to be an alternative to charging someone with resisting arrest. *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982).

### **Acts Constituting Offense.**

Defendant was not guilty of violating former section concerning obstructing or where the sheriff subsequently informed defendant that the arrangement which had been made with a deputy sheriff regarding an attached crop was unsatisfactory; the former statute meant to punish obstruction of or opposition to the officer and not merely meant to defeat the execution of process otherwise. *Warren v. State*, 179 Ark. 725, 17 S.W.2d 866 (1929) (decision under prior law).

Defendant who became involved in a police station brawl, should have been charged with resisting arrest or disorderly conduct not with interfering with a police officer in the performance of his duties. *Breakfield v. State*, 263 Ark. 398, 566 S.W.2d 729 (1978).

Defendant's actions held not to support his conviction for interfering with a police officer in the performance of his duties, although they may have constituted the offense of resisting arrest. *State v. Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980).

Where defendant fired several shots at a police officer in order to avoid apprehension, the defendant could not have properly been charged with interference with a law enforcement officer, but should instead have been prosecuted for resisting arrest. *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982).

One may be found guilty of interference where one interferes with an official investigation that precedes an effort to effect an arrest. *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

### **Evidence.**

To convict an accused of assaulting an officer, it was not necessary that there be direct evidence that those assaulting the police officer did so from common design, intent, and purpose, but such could be proven by all the circumstances. *Griffin v.*

*State*, 248 Ark. 1223, 455 S.W.2d 882 (1970) (decision under prior law).

Evidence of assault with an eight ounce drink glass was sufficient since any object likely to cause death or great bodily injury could be a deadly weapon. *Hunt v. State*, 255 Ark. 51, 498 S.W.2d 654 (1973) (decision under prior law).

Evidence held sufficient to support conviction. *Delrio v. State*, 263 Ark. 888, 568 S.W.2d 15 (1978); *Easterly v. State*, 8 Ark. App. 135, 648 S.W.2d 843 (1983); *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

### **Justification.**

Refusal to give the defendant's requested instruction on justification for the use of physical force in defense of another person held to be error. *Lucas v. State*, 5 Ark. App. 168, 634 S.W.2d 145 (1982).

### **Performance of Official Duties.**

Police officer's statement that the encounter occurred just before he was to interview some complainants would not support a conviction under this section. *Breakfield v. State*, 263 Ark. 398, 566 S.W.2d 729 (1978).

Court did not abuse its discretion in not allowing the defendants to offer proof of certain alleged incidents of prior misconduct on the part of the officer, which the defendants offered in an effort to show that the officer may not have been engaged in official business at the time of the incident in question. *Blakemore v. State*, 268 Ark. 145, 594 S.W.2d 231 (1980).

Where a police officer who was in the performance of his official duties in going to investigate another incident in which the defendant had been a participant became involved in a scuffle with the defendant and defendant pointed a rifle at the officer, the defendant could be convicted under this section. *Gilmer v. State*, 269 Ark. 30, 602 S.W.2d 406 (1980).

### **Resistance or Interference.**

The distinction between resisting arrest as defined in § 5-54-103 and interference with a law enforcement officer as defined in this section is that resisting the officer occurs when one knowingly resists a person known by him to be a law enforcement officer attempting to effect an arrest, while the interference referred to in this section is designed to cover the situation



where a person is interfering with an officer performing some duty other than arresting the person charged. *Gilmer v. State*, 269 Ark. 30, 602 S.W.2d 406 (1980).

#### **Search Warrant.**

Where search warrant was regular on its face, one could not obstruct the service of such process without being subject to prosecution. *Crabtree v. State*, 238 Ark. 358, 381 S.W.2d 729 (1964) (decision under prior law).

#### **Separate Offenses.**

Where defendant drew a pistol on a police officer and took the officer's revolver

away from him, there were two separate crimes although arising out of the same incident. *Decker v. State*, 251 Ark. 28, 471 S.W.2d 343 (1971) (decision under prior law).

**Cited:** *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980); *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984); *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

### **5-54-105. Hindering apprehension or prosecution.**

(a) A person commits an offense under this section if, with purpose to hinder the apprehension, prosecution, conviction, or punishment of another person for an offense, he or she:

- (1) Harbors or conceals the other person;
- (2) Provides or aids in providing the other person with a weapon, money, transportation, disguise, or other means of avoiding apprehension, discovery, or effecting escape;
- (3) Prevents or obstructs anyone from performing an act which might aid in the discovery, apprehension, or identification of the other person by means of force or intimidation or the threat of force or intimidation, or by means of deception;
- (4) Conceals, alters, destroys, or otherwise suppresses the discovery of any fact, information, or other thing related to the crime which might aid in the discovery, apprehension, or identification of the other person;
- (5) Warns the other person of impending discovery, apprehension, or identification;
- (6) Volunteers false information to a law enforcement officer; or
- (7) Purposely lies or attempts to purposely provide erroneous information, documents, or other instrumentalities which he or she knows to be false to a certified law enforcement officer that would distract from the true course of the investigation or inhibit the logical or orderly progress of the investigation.

(b)(1)(A) Hindering apprehension or prosecution is a Class B felony if the conduct of the person assisted in violation of this section constitutes a Class Y felony or a Class A felony.

(B) However, except as provided in subdivision (b)(2) of this section, if the defendant shows by a preponderance of the evidence that he or she stands to the person assisted in the relation of parent, child, brother, sister, husband, or wife, hindering apprehension or prosecution is a Class D felony.

(2) Subdivision (b)(1)(B) of this section does not apply if the offense of the person assisted is:

- (A) Capital murder, as prohibited in § 5-10-101;

- (B) Murder in the first degree, as prohibited in § 5-10-102;
- (C) Kidnapping, as prohibited in § 5-11-102; or
- (D) Rape, as prohibited in § 5-14-103.

(c) Hindering apprehension or prosecution is a felony classified one (1) degree below the felony constituted by the conduct of the person assisted in violation of this section if the conduct is a Class B felony or a Class C felony.

(d)(1) Hindering apprehension or prosecution is a Class A misdemeanor if the conduct of the person assisted in violation of this section is a Class D felony or an unclassified felony.

(2) Hindering apprehension or prosecution is a Class D felony if the person in violation of this section was assisting an escapee from correctional custody sentenced after being found guilty of a felony.

(3) Otherwise, hindering apprehension or prosecution is a misdemeanor classed one (1) degree below the misdemeanor constituted by the conduct of the person assisted in violation of this section.

**History.** Acts 1975, No. 280, § 2805; 2805; Acts 1997, No. 743, § 1; 2005, No. 1977, No. 360, § 15; 1985, No. 698, § 1; 1867, § 1. 1985, No. 1049, § 1; A.S.A. 1947, § 41-

RESEARCH REFERENCES

**Ark. L. Rev.** The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

CASE NOTES

ANALYSIS

- Constitutionality.
- Applicability.
- Accessory After the Fact.
- Accomplice.
- Affirmative Act.
- Evidence.
- Harboring or Concealment.
- Knowledge and Intent.
- Reasonable Cause to Arrest.

**Constitutionality.**

The mere existence of overlapping provisions in this section and § 5-53-111 does not render either statute constitutionally infirm; there appears to be no impermissible uncertainty in the definitions of the respective offenses. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

**Applicability.**

The plain language of subdivision (a)(4) precludes a construction that limits its applicability to a person's acts of hindering that transpire before a criminal sus-

pect has been identified and arrested. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

**Accessory After the Fact.**

An instruction that an accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate or harbors or protects the person charged with the crime; in other words, a person who harbors, receives, relieves, comforts or assists the felon was not erroneous. *Higgins v. State*, 136 Ark. 284, 206 S.W. 440 (1918) (decision under prior law).

One who was formerly an accessory after the fact is now guilty of a separate crime, i.e., hindering apprehension and prosecution. *Tyler v. State*, 265 Ark. 822, 581 S.W.2d 328 (1979).

**Accomplice.**

An accessory before the fact is now referred to as an accomplice, defined in § 5-2-403, and one who was formerly an accessory after the fact is now guilty of a

separate crime under this section. *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

### **Affirmative Act.**

To constitute the crime of accessory after the fact there must have been some affirmative act, as mere passive failure to disclose commission of a crime did not make one an accessory after the fact. *Fields v. State*, 213 Ark. 899, 214 S.W.2d 230 (1948) (decision under prior law).

Evidence held to show that there was an affirmative attempt upon the part of the defendant to prevent disclosure of details of a crime and justified conviction of defendant as accessory after the fact. *Fields v. State*, 213 Ark. 899, 214 S.W.2d 230 (1948) (decision under prior law).

### **Evidence.**

Evidence held insufficient to support conviction. *Flippo v. State*, 258 Ark. 233, 523 S.W.2d 390 (1975) (decision under prior law).

Under subsection (a), providing for six different ways in which the offense can be committed with only one involving dishonesty or false statement, evidence of a misdemeanor conviction for that offense was not admissible for impeachment purposes until it was shown that the conviction was based upon an act of dishonesty or false statement. *West v. State*, 27 Ark. App. 49, 766 S.W.2d 22 (1989).

Evidence was more than sufficient from which a jury could infer that the defendant destroyed fingerprints on the weapon, hid the gun from authorities, and did not tell the authorities of the gun's whereabouts until confronted by the investigating officers. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

Defendant's conviction for hindering the apprehension or prosecution of her child's abuser, in violation of subdivisions (a)(6) or (7) of this section, was supported by the evidence because defendant consistently told medical personnel and the police that her 23-month-old child's life-threatening brain injury was caused by falling from a top bunk bed. *Sullivan v. State*, 2012 Ark. 74, 386 S.W.3d 507 (2012).

### **Harboring or Concealment.**

One who, with full knowledge that a crime had been committed, harbored and protected the felon, was guilty as acces-

sory after the fact. *State v. Jones*, 91 Ark. 5, 120 S.W. 154 (1909); *Froman v. State*, 232 Ark. 697, 339 S.W.2d 601 (1960) (preceding decisions under prior law).

### **Knowledge and Intent.**

One who, knowing of a crime, concealed it from the magistrate from anxiety for his own safety and not to shield the criminal, was not an accomplice. *Melton v. State*, 43 Ark. 367 (1884); *Carroll v. State*, 45 Ark. 539 (1885). See also *Edmonson v. State*, 51 Ark. 115, 10 S.W. 21 (1888); *Green v. State*, 51 Ark. 189, 10 S.W. 266 (1889); *McFalls v. State*, 66 Ark. 16, 48 S.W. 492 (1898) (preceding decisions under prior law).

The mere fact that one remained silent after learning of the commission, without intending to shield the criminal, did not make him an accessory. *Butt v. State*, 81 Ark. 173, 98 S.W. 723 (1906); *Davis v. State*, 96 Ark. 7, 130 S.W. 547 (1910); *Simms v. State*, 105 Ark. 16, 150 S.W. 113 (1912); *Burrow v. State*, 109 Ark. 365, 159 S.W. 1123 (1913) (preceding decisions under prior law).

Although former law required that the hinderer have full knowledge of the crime committed, this section speaks in terms of the actor's purpose rather than the certainty of his knowledge respecting the consummated crime, and requires only that the hinderer purposely aid one sought for an offense. *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979).

Evidence held sufficient to support finding that defendant had reason to believe that the accused had committed an offense and that she purposely hindered his prosecution. *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979).

Evidence that defendant, the husband of a murder victim, met with his stepdaughter, the murderer, after the murder; he denied knowledge of her whereabouts; he admitted giving her money and a car to go to Mississippi; and he had a sexual relationship with her; was sufficient to convict him of hindering her apprehension under this section. *Devor v. State*, 2012 Ark. App. 82, 389 S.W.3d 22 (2012).

### **Reasonable Cause to Arrest.**

The district court was not clearly erroneous in concluding that the parolee's attempt to conceal herself in the defendant's room, with his knowledge, coupled



with the defendant's assertion of ignorance regarding the parolee's whereabouts, constituted reasonable belief by the officers that the defendant was attempting to hinder the apprehension of the parolee in violation of this section;

therefore, the officers had reasonable cause to arrest the defendant. *Washington v. Simpson*, 806 F.2d 192 (8th Cir. 1986).

**Cited:** *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983).

**5-54-106. Aiding consummation of offense.**

(a) A person commits an offense under this section if he or she knowingly aids another person by:

- (1) Safeguarding or securing the proceeds of an offense; or
- (2) Converting the proceeds of an offense into negotiable funds.

(b)(1) A person violating any provision of this section is guilty of a Class D felony if the conduct of the person aided in violation of this section constitutes a felony of any class.

(2) Otherwise, a violation of this section is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2806; A.S.A. 1947, § 41-2806.

**CASE NOTES**

**Accomplices.**

One who knowingly receives stolen property for the purpose of safeguarding or securing the proceeds of the offense or converting the proceeds into negotiable funds might now be guilty of aiding the

consummation of an offense under this section, but is not an accomplice in the sense of § 5-2-403 in that he or she aids the thief in planning or committing the crime. *Tyler v. State*, 265 Ark. 822, 581 S.W.2d 328 (1979).

**5-54-107. Compounding.**

(a) A person commits the offense of compounding if he or she:

(1) Solicits, accepts, or agrees to accept any pecuniary benefit as consideration for refraining from reporting to a law enforcement authority the commission or suspected commission of any offense or information relating to an offense; or

(2) Offers, confers, or agrees to confer a benefit and the receipt of the benefit is prohibited by this section.

(b) Compounding is a:

- (1) Class B felony if the offense concealed is a Class Y felony;
- (2) Class C felony if the offense concealed is a Class A felony;
- (3) Class D felony if the offense concealed is:
  - (A) A Class B felony;
  - (B) A Class C felony;
  - (C) A Class D felony; or
  - (D) An unclassified felony; or

(4) Class B misdemeanor if the offense concealed is a misdemeanor of any class.

**History.** Acts 1975, No. 280, § 2807; 1977, No. 360, § 16; A.S.A. 1947, § 41-2807; Acts 1991, No. 1049, § 1.

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — Criminal Law, 14 U. Ark. Little Rock L.J. 753.

### CASE NOTES

#### ANALYSIS

Contracts.  
Pecuniary Benefit.

#### Contracts.

Any contract, the consideration of which was to conceal crime, or stifle a prosecution therefor, was void. *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S.W. 198 (1912) (decision under prior law).

A deed of trust executed to secure the payment of embezzled money was not void, in the absence of a promise to forbear

prosecution of the husband or to suppress evidence tending to prove his guilt. *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S.W. 198 (1912) (decision under prior law).

#### Pecuniary Benefit.

Where five people, in return for a promised reward, abetted another by agreeing to conceal the truth of a crime, they were all guilty as principals. *Bridges v. State*, 257 Ark. 527, 519 S.W.2d 756 (1975) (decision under prior law).

**Cited:** *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

### 5-54-108. Hindering prosecution and compounding — No defense.

It is no defense to a prosecution for hindering prosecution or compounding that the principal offender is not apprehended, prosecuted, convicted, or punished.

**History.** Acts 1975, No. 280, § 2808; A.S.A. 1947, § 41-2808.

### RESEARCH REFERENCES

**Ark. L. Rev.** The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

### 5-54-109. Refusing to assist law enforcement officer.

(a) A person commits the offense of refusing to assist a law enforcement officer if, upon command by a person known by him or her to be a law enforcement officer, the person unreasonably refuses or fails to assist in effecting a lawful arrest or preventing another person from committing an offense.

(b) Refusing to assist a law enforcement officer is a Class C misdemeanor.

**History.** Acts 1975, No. 280, § 2809; A.S.A. 1947, § 41-2809.

### 5-54-110. First degree escape.

(a) A person commits the offense of first degree escape if:

(1) At any time, including from the point of departure from confinement to the return to confinement, aided by another person actually present, he or she uses or threatens to use physical force in escaping from:

- (A) Custody;
- (B) A correctional facility;
- (C) A juvenile detention facility; or
- (D) A youth services program; or

(2) At any time, including from the point of departure from confinement to the return to confinement, he or she uses or threatens to use a deadly weapon in escaping from:

- (A) Custody;
- (B) A correctional facility;
- (C) A juvenile detention facility; or
- (D) A youth services program.

(b)(1) First degree escape is a Class A felony if, at the time of the escape, the person is in the custody of:

- (A) The Department of Correction;
- (B) The Department of Community Correction; or
- (C) A law enforcement agency.

(2) Otherwise first degree escape is a Class C felony.

**History.** Acts 1975, No. 280, § 2810; 1348, § 1; 2005, No. 1994, § 254; 2009, A.S.A. 1947, § 41-2810; Acts 1997, No. 478, § 1. 1229, § 3; 1997, No. 1299, § 3; 2003, No.

## RESEARCH REFERENCES

**Ark. L. Rev.** Manslaughter: The Resting Place of Several Former Statutes, 30 Ark. L. Rev. 213.

## CASE NOTES

### ANALYSIS

Accomplice.  
Custody.  
Furnishing Implements for Escape.  
Indictment or Information.  
Jury Question.  
Sentencing.  
Separate Offenses.

### Accomplice.

A prisoner who aided others to escape, and escaped himself by the same means,

was an accomplice to such escape. *Hillian v. State*, 50 Ark. 523, 8 S.W. 834 (1888) (decision under prior law).

Evidence held sufficient to support conviction as an accomplice. *Shinsky v. State*, 250 Ark. 620, 466 S.W.2d 911 (1971) (decision under prior law); *Ruiz v. State*, 5 Ark. App. 151, 633 S.W.2d 399 (1982).

To convict one as an accomplice to first degree escape, the state is required to prove he aided, agreed to aid or attempted to aid another person to escape as that crime is defined in this section. *Ruiz v.*



State, 5 Ark. App. 151, 633 S.W.2d 399 (1982).

### **Custody.**

A person confined in jail was “in custody” within former section which penalized anyone who rescued a felon. *Hillian v. State*, 50 Ark. 523, 8 S.W. 834 (1888) (decision under prior law).

The mere fact of physical custody or imprisonment was not sufficient evidence to sustain a conviction for escape or attempt to escape, but the burden was upon the state to prove that such custody or imprisonment was lawful. *Harding v. State*, 248 Ark. 1240, 455 S.W.2d 695 (1970) (decision under prior law).

Evidence held sufficient to establish that defendant was lawfully imprisoned. *Brown v. State*, 252 Ark. 846, 481 S.W.2d 366 (1972) (decision under prior law).

State held to have failed to show that the defendant was in lawful custody at the time he ran away from the presence of the officers, so as to constitute offense of escape under former section concerning escape from penitentiary. *Akins v. State*, 253 Ark. 273, 485 S.W.2d 535 (1972) (decision under prior law).

### **Furnishing Implements for Escape.**

A person guilty of furnishing implements for the escape of county prisoners was liable to be punished under former section concerning penalty for those conveying disguised instruments into jail and not under former section concerning penalty for anyone setting at liberty a prisoner who has been lawfully arrested. *Autrey v. State*, 155 Ark. 546, 244 S.W. 711 (1922) (decision under prior law).

### **Indictment or Information.**

Indictment held sufficient. *Dickens v. State*, 109 Ark. 425, 160 S.W. 218 (1913) (decision under prior law).

### **Jury Question.**

Whether the defendant jumped in front of the arresting officer to prevent him

from shooting his brother, or whether he did so to rescue his brother, was for the jury to decide. *Bowlin v. State*, 175 Ark. 1047, 1 S.W.2d 546 (1928) (decision under prior law).

### **Sentencing.**

Circuit court did not err in denying petitioner postconviction relief because he failed to show he was prejudiced when trial counsel stated during his opening statement that petitioner escaped from jail while awaiting trial; during sentencing at petitioner’s capital-murder trial, the State could have moved to introduce his conviction for escape to be used as an aggravating circumstance in the jury’s weighing of the death penalty because the prior felony involved the use or threat of violence. *Sales v. State*, 2014 Ark. 384, 441 S.W.3d 883 (2014).

### **Separate Offenses.**

Since kidnapping, theft, and escape involve proof of different elements and are punishable as separate crimes, the defendant was not subjected to double jeopardy due to the multiple sentences imposed by the trial court. *Matthews v. Lockhart*, 726 F.2d 394 (8th Cir. 1984).

Defendant did not commit first-degree escape when he hid in a hog-slop tank in a prison that was hauled from the prison, jumped from the tank once it was outside the prison, walked five miles to the victim’s home, and killed and robbed the victim more than three hours after he had escaped from prison; defendant had already completed his escape from prison, by leaving the bounds within which he was required to remain, when he killed and robbed the victim. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

**Cited:** *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980); *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

## **5-54-111. Second degree escape.**

(a) A person commits the offense of second degree escape if he or she:

(1) At any time, including from the point of departure from confinement to the return to confinement, uses or threatens to use physical force in escaping from custody;

(2) Having been found guilty of a felony, escapes from custody;

(3) Escapes from a correctional facility;

(4) Escapes from a juvenile detention facility; or

(5) Escapes from a youth services program.

(b)(1) Second degree escape is a Class B felony if, at the time of the escape, the person is in the custody of:

(A) The Department of Correction;

(B) The Department of Community Correction; or

(C) A law enforcement agency.

(2) Otherwise second degree escape is a Class D felony.

**History.** Acts 1975, No. 280, § 2811; 1348, § 2; 2005, No. 1994, § 255; 2009, A.S.A. 1947, § 41-2811; Acts 1997, No. No. 478, § 2. 1229, § 4; 1997, No. 1299, § 4; 2003, No.

## CASE NOTES

### ANALYSIS

Correctional Facility.

Evidence.

Lesser-Included Offenses.

Proof.

### Correctional Facility.

Defendant escaping from the holding cell was properly charged with second-degree escape. *Glover v. State*, 8 Ark. App. 104, 648 S.W.2d 824 (1983).

County jail was a "correctional facility." *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

### Evidence.

Evidence held sufficient to support the defendant's conviction for escape. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982).

Where the defendant forged a court order which declared his convictions void, there was sufficient evidence to sustain a guilty verdict for second degree escape, and the Attorney General's statement that the order was valid did not legitimize the fraudulent order. *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986).

### Lesser-Included Offenses.

Offense of third-degree escape of which defendant was found guilty is a lesser-included offense of second-degree escape with which he was charged. *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977).

### Proof.

To convict a person of the crime of escape, it was not sufficient merely to offer

evidence that someone by the same name of the accused was convicted, but there had to be evidence that the accused was the same identical person who was convicted. *Pennington v. State*, 260 Ark. 844, 545 S.W.2d 72 (1977) (decision under prior law).

It was not necessary that the state prove a transfer of an inmate from one institution to another so long as it was within the authority of the Department of Correction to make such transfer and the state needed to prove only that the accused was in the custody of the department when he escaped. *Pennington v. State*, 260 Ark. 844, 545 S.W.2d 72 (1977) (decision under prior law).

There is nothing in this section suggesting that proof of the specific crime is an element of escape, only that the accused has escaped from a correctional facility. *Bussard v. State*, 296 Ark. 556, 759 S.W.2d 24 (1988).

Because defendant was not "in custody" at the time defendant violated the conditions of defendant's release on bond under § 16-90-122, the circuit court erred in denying defendant's motion for directed verdict on defendant's conviction for second-degree escape under subdivision (a)(2) of this section. *Magness v. State*, 2012 Ark. 16, 386 S.W.3d 390 (2012).

**Cited:** *Glick v. State*, 3 Ark. App. 175, 623 S.W.2d 546 (1981); *Bosnick v. State*, 275 Ark. 52, 627 S.W.2d 23 (1982); *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002); *Avery v. State*, 93 Ark. App. 112, 217 S.W.3d 162 (2005).

**5-54-112. Third degree escape.**

(a) A person commits the offense of third degree escape if he or she escapes from custody.

(b) It is a defense to a prosecution under this section that the person escaping was in custody pursuant to an unlawful arrest.

(c)(1) Third degree escape is a Class C felony if, at the time of the escape, the person is in the custody of:

(A) The Department of Correction;

(B) The Department of Community Correction; or

(C) A law enforcement agency.

(2) Otherwise third degree escape is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2812; A.S.A. 1947, § 41-2812; Acts 2009, No. 478, § 3.

**CASE NOTES****ANALYSIS**

Defenses.

Evidence.

Instructions.

Intent.

**Defenses.**

Since a conviction of third-degree escape can be based on any of three culpable mental states, this crime is a general intent crime for which voluntary intoxication is no defense. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985).

**Evidence.**

Evidence held sufficient for the jury to decide that defendant was guilty of third degree escape. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

**Instructions.**

Where the defendant escaped from the holding cell, refusal to instruct on the lesser included offense of third-degree escape from mere custody was proper. *Glover v. State*, 8 Ark. App. 104, 648 S.W.2d 824 (1983).

**Intent.**

Specific intent is not a necessary element of this crime; the mens rea may be satisfied by proof that the accused acted recklessly or knowingly, as well as by proof that the accused acted purposely. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985).

**Cited:** *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977); *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

**5-54-113. Permitting escape in the first degree.**

(a) A public servant responsible for supervision of persons detained in correctional facilities or in custody commits the offense of permitting escape in the first degree if he or she knowingly permits the escape of a person known to be detained in a correctional facility or in custody pursuant to an arrest for, or a charge or conviction of, a felony of any class.

(b) Permitting escape in the first degree is a Class C felony.

**History.** Acts 1975, No. 280, § 2813; A.S.A. 1947, § 41-2813.



## CASE NOTES

## ANALYSIS

In General.  
 Construction.  
 Drunkenness.  
 Evidence.  
 Indictment or Information.  
 Intent.

**In General.**

A voluntary escape took place when one who had a felon lawfully in his custody voluntarily permitted him to escape from it or to go at large. *Martin v. State*, 32 Ark. 124 (1877) (decision under prior law).

**Construction.**

Former section establishing penalty for those permitting the escape of any convict should have been strictly construed. *Decker v. State*, 189 Ark. 739, 75 S.W.2d 69 (1934) (decision under prior law).

**Drunkenness.**

Where the escape of a prisoner was not caused or contributed to by the defendant's drunkenness, it was held that the fact that the defendant was drunk did not render him guilty of permitting the escape of a convict. *Decker v. State*, 189 Ark. 739,

75 S.W.2d 69 (1934) (decision under prior law).

**Evidence.**

The fact that a prisoner was hiding outside the prison grounds was sufficient evidence for a jury to infer that he intended to escape. *Cassady v. State*, 247 Ark. 690, 447 S.W.2d 144 (1969) (decision under prior law).

**Indictment or Information.**

Indictment held to sufficiently allege that the prisoner was in the defendant's lawful custody. *Haupt v. State*, 100 Ark. 409, 140 S.W. 294 (1911) (decision under prior law).

**Intent.**

The offense of voluntary escape consisted of voluntarily suffering, permitting or conniving at the escape of a prisoner from custody or permitted him to go at large, and it was unnecessary to prove that this was done with the intent to save him from trial or the execution of a sentence. *Haupt v. State*, 100 Ark. 409, 140 S.W. 294 (1911) (decision under prior law).

**Cited:** *State v. Garrison*, 272 Ark. 470, 615 S.W.2d 371 (1981).

**5-54-114. [Repealed.]**

**Publisher's Notes.** This section, concerning permitting escape in the second degree, was repealed by Acts 2005, No.

1994, § 532. The section was derived from Acts 1975, No. 280, § 2814; A.S.A. 1947, § 41-2814.

**5-54-115. Permitting escape or unauthorized departure in the second degree.**

(a) A public servant is responsible for the supervision of persons from:

- (1) A correctional facility;
- (2) Custody; or
- (3) Pursuant to a court order or petition in:
  - (A) The Arkansas State Hospital; or
  - (B) A juvenile detention facility or youth services program.

(b) A public servant, as listed in subdivision (a)(3) of this section, commits the offense of permitting escape or unauthorized departure in the second degree if he or she recklessly permits a person to escape or make an unauthorized departure.

(c) Permitting escape or unauthorized departure in the second degree is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2815; 1229, § 5; 1997, No. 1299, § 5; 2005, No. A.S.A. 1947, § 41-2815; Acts 1997, No. 1994, § 329.

### **5-54-116. Aiding an unauthorized departure.**

(a) A person commits the offense of aiding an unauthorized departure if, not being an inmate in a youth services program, a youth services facility, or the Arkansas State Hospital, he or she knowingly aids another person in making or attempting to make an unauthorized departure from a juvenile detention facility, a youth services program, or the Arkansas State Hospital.

(b)(1) Aiding an unauthorized departure is a Class C felony if the person aiding an unauthorized departure uses physical force or uses or threatens to use a deadly weapon.

(2) Otherwise, aiding an unauthorized departure is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2816; 1229, § 6; 1997, No. 1299, § 6; 2005, No. A.S.A. 1947, § 41-2816; Acts 1997, No. 1994, § 256.

### **5-54-117. Assisting in or furnishing an implement for escape.**

(a) A person commits the offense of assisting in or furnishing an implement for escape if, with the purpose of facilitating escape, he or she:

- (1) Introduces an implement for escape into a correctional facility;
- (2) Provides an inmate in a correctional facility with an implement for escape;
- (3) Provides a person in custody with an implement for escape;
- (4) Provides transportation of any kind that is used in the commission or furtherance of an escape from a correctional facility;
- (5) Furnishes food, clothing, finances, or other aid to a person who escaped from a correctional facility; or
- (6) Provides shelter or housing to a person who escaped from a correctional facility.

(b)(1) Assisting in or furnishing an implement for escape is a Class B felony if the implement for escape provided is a deadly weapon.

(2) Otherwise assisting in or furnishing an implement for escape is a Class C felony.

**History.** Acts 1975, No. 280, § 2817; A.S.A. 1947, § 41-2817; Acts 2009, No. 478, § 4; 2011, No. 1120, § 11.

**Amendments.** The 2011 amendment substituted “assisting in or furnishing” for “furnishing” or variant in (b)(1) and (b)(2).

### **CASE NOTES**

#### **Acts Constituting Offense.**

Offense was complete when the instrument was conveyed into the jail with the intent mentioned, whether the escape was affected or attempted or not. *Maxey v.*

*State*, 76 Ark. 276, 88 S.W. 1009 (1905) (decision under prior law).

A person guilty of furnishing implements for the escape of county prisoners was liable to be punished under former

section concerning penalty for those conveying disguised instruments into jail and not under former section concerning penalty for anyone setting at liberty a pris-

oner who has been lawfully arrested. *Autrey v. State*, 155 Ark. 546, 244 S.W. 711 (1922) (decision under prior law).

### **5-54-118. Furnishing implement for unauthorized departure.**

(a) A person commits the offense of furnishing an implement for unauthorized departure if, with the purpose of facilitating an unauthorized departure, he or she:

(1) Introduces an implement for unauthorized departure into the Arkansas State Hospital or a youth services program; or

(2) Provides a person detained in the Arkansas State Hospital or a youth services program with an implement for unauthorized departure.

(b)(1) Furnishing an implement for unauthorized departure is a Class C felony if the implement furnished is a deadly weapon.

(2) Otherwise, furnishing an implement for unauthorized departure is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2818; A.S.A. 1947, § 41-2818; Acts 2005, No. 1994, § 257.

### **5-54-119. Furnishing, possessing, or using prohibited articles.**

(a) A person commits the offense of furnishing a prohibited article if he or she knowingly:

(1) Introduces a prohibited article into a correctional facility, the Arkansas State Hospital, or a youth services program; or

(2) Provides a person confined in a correctional facility, the Arkansas State Hospital, or a youth services program with a prohibited article.

(b)(1)(A) Furnishing or providing a weapon, intoxicating beverage, controlled substance, moneys, a cellular telephone or other communication device, the components of a cellular telephone or other communication device, or any other items that would facilitate an escape, engaging in a continuing criminal enterprise, § 5-64-405, or violence within a facility is a Class B felony.

(B) Otherwise, furnishing a prohibited article is a Class C felony.

(2) This section does not apply to a religious official who supplies sacramental wine labeled as sacramental wine to an inmate in the Department of Correction for the sole purpose of an approved religious service, pursuant to rules and regulations promulgated by the Board of Corrections.

(c)(1) A person commits possessing a prohibited article if, being an inmate of a correctional facility or in the custody of a correctional facility, the person knowingly possesses a:

(A) Cellular telephone or other communication device; or

(B) Component of a cellular telephone or other communication device.

(2) Possessing a prohibited article is a Class B felony.



(d)(1) A person commits using a prohibited article if, being an inmate of a correctional facility or in the custody of a correctional facility, the person knowingly uses a cellular telephone or other communication device to commit or to attempt, conspire, or solicit to commit:

(A) An escape from the custody of the correctional facility;

(B) Engaging in a continuing criminal enterprise, § 5-64-405; or

(C) A violent felony as defined at § 5-4-501(d)(2).

(2) Using a prohibited article is a Class A felony.

**History.** Acts 1975, No. 280, § 2819; 1977, No. 360, § 17; 1985, No. 686, § 1; A.S.A. 1947, § 41-2819; Acts 1988 (4th Ex. Sess.), No. 8, § 2; 1988 (4th Ex. Sess.), No. 23, § 2; 2005, No. 168, § 1; 2005, No. 1994, § 258; 2009, No. 479, § 1; 2013, No. 129, § 1.

**Amendments.** The 2013 amendment

substituted “a correctional facility or in the custody of a correctional facility” for “the Department of Correction” in (c)(1) and (d)(1); substituted “uses” for “used” in (d)(1); and substituted “the correctional facility” for “the Department of Correction” in (d)(1)(A).

## RESEARCH REFERENCES

**ALR.** Propriety of lesser included offense charge in state prosecution of narcotics defendant — Marijuana cases. 1 A.L.R.6th 549.

Propriety of lesser included offense charge in state prosecution of narcotics

defendant — Cocaine cases. 2 A.L.R.6th 551.

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

### ANALYSIS

Evidence.

Lesser-Included Offenses.

### Evidence.

Evidence was sufficient to sustain conviction. *Sims v. State*, 30 Ark. App. 168, 786 S.W.2d 839 (1990).

### Lesser-Included Offenses.

Possession of marijuana is a lesser-included offense of furnishing a prohibited

item. *Goodwin v. State*, 342 Ark. 161, 27 S.W.3d 397 (2000), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

**Cited:** *K.W. v. State*, 327 Ark. 205, 937 S.W.2d 658 (1997).

## 5-54-120. Failure to appear.

(a) As used in this section, “pending charge” means a charge that results from an arrest or after the filing of a criminal information or indictment and that has not been resolved by acquittal, conviction, dismissal, or nolle prosequi.

(b) A person commits the offense of failure to appear if he or she fails to appear without reasonable excuse subsequent to having been:

(1) Cited or summonsed as an accused; or

(2) Lawfully set at liberty upon condition that he or she appear at a specified time, place, and court.

(c) Failure to appear is a:

(1) Class C felony if the required appearance was in regard to a pending charge or disposition of a felony charge either before or after a determination of guilt of the felony charge;

(2) Class D felony if the required appearance was in regard to an order to appear issued before a revocation hearing under § 16-93-307 and the defendant was placed on probation or received a suspended sentence for a felony offense;

(3) Class A misdemeanor if the required appearance was in regard to a pending charge or disposition of a Class A misdemeanor charge either before or after a determination of guilt of the Class A misdemeanor charge;

(4) Class B misdemeanor if the required appearance was in regard to a pending charge or disposition of a Class B misdemeanor charge either before or after a determination of guilt of the Class B misdemeanor charge;

(5) Class B misdemeanor if the required appearance was in regard to a pending charge or disposition of a Class C misdemeanor charge either before or after a determination of guilt of the Class C misdemeanor charge;

(6) Unclassified misdemeanor with the same penalty as the unclassified misdemeanor in the pending charge or disposition if the required appearance was in regard to a pending charge or disposition of an unclassified misdemeanor either before or after a determination of guilt on the unclassified misdemeanor charge; and

(7) Class C misdemeanor if the required appearance was in regard to a pending charge or disposition of a violation either before or after a determination of guilt of the violation charge.

(d) This section does not apply to an order to appear imposed as a condition of suspension or probation under § 5-4-303.

**History.** Acts 1975, No. 280, § 2820; A.S.A. 1947, § 41-2820; Acts 1991, No. 916, § 1; 2011, No. 514, § 1; 2011, No. 570, § 32; 2013, No. 1193, § 1; 2015, No. 538, § 1; 2015, No. 1155, § 9.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Amendments.** The 2011 amendment by No. 514 rewrote (b) and (c).

The 2011 amendment by No. 570, in (d), substituted “under § 5-4-303” for “pursuant to § 5-4-303” and “under § 16-93-307” for “pursuant to § 5-4-310”.

The 2013 amendment added (b)(2); and redesignated (c)(1) through (6) as (b)(3) through (8).

The 2015 amendment by No. 538 added (a) and redesignated the remaining subsections accordingly; inserted “felony” preceding “charge” at the end of (c)(1); inserted “received a” preceding “suspended” in (c)(2); inserted “Class A misdemeanor” preceding “charge” at the end of (c)(3); inserted “Class B misdemeanor” preceding “charge” at the end of (c)(4); inserted “Class C misdemeanor” preceding “charge” at the end of (c)(5); deleted (c)(6) [formerly (b)(6)] and redesignated the remaining subdivisions accordingly; in present (c)(6), substituted “Unclassified misdemeanor” for “Class B misdemeanor” at the beginning and inserted “unclassified misdemeanor” preceding “charge” at the end; and inserted “violation” preceding “charge” at the end of (c)(7).

The 2015 amendment by No. 1155 deleted (b)(6).

## CASE NOTES

## ANALYSIS

Accomplice.  
Evidence.  
Excuse.  
Propriety of Sentence.  
Requirements.

**Accomplice.**

Evidence was sufficient to support conviction of bail bondsman as accomplice to failure to appear with respect to the person for whom he was bail bondsman, but not for another person where there was no evidence showing that he was aware of the criminal charges pending against such other person. *Martinez v. State*, 269 Ark. 231, 601 S.W.2d 576 (1980).

**Evidence.**

Evidence did not support a conviction for failure to appear because it was insufficient to show that defendant knew that his trial started at 8:30 a.m. An order granting a continuance and setting trial for March 11, 2014, was conspicuously void of a specified time. *Clark v. State*, 2015 Ark. App. 142, 457 S.W.3d 305 (2015).

**Excuse.**

Where the defendant had actual notice of the date he was to appear, the failure of the court to give him written notice of the time and place to appear did not violate his due process rights and was not sufficient cause to reverse his conviction for failure to appear. *Harris v. State*, 6 Ark. App. 89, 638 S.W.2d 698 (1982).

Even if defendant proved conclusively that he was advised by his lawyer not to appear, his failure to appear, in violation of this section, would not have been excused. *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985).

Defendant did not establish that he had a reasonable excuse for his failure to appear. *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Defendant was improperly convicted of failure to appear because the trial court erred by allowing a former attorney to testify regarding a phone call where de-

fendant was advised of his court date; the communication between defendant and his former attorney was privileged. The former attorney's testimony was the only evidence in the record that defendant did not have a reasonable excuse for failure to appear based on lack of notice. *Buckley v. State*, 2014 Ark. App. 516, 443 S.W.3d 559 (2014).

**Propriety of Sentence.**

Sentence of 119 months for failure to appear was not an abuse of discretion, it was clear from the trial court's ruling that the severity of the sentence that defendant received was due to the seriousness of the circumstances surrounding the offense and there was no indication that defendant was being punished for offenses for which he was not convicted or that his sentence was a result of passion or prejudice. *Whittier v. State*, 2015 Ark. App. 536 (2015).

**Requirements.**

Circuit court erred in denying defendant's motion to dismiss where the state failed to produce substantial evidence that defendant received actual notice of the time and place to appear in court or that she received written notice of the time and place to appear; more had to be offered in the way of documentary proof or a judge's order, either written or verbal, to subject a defendant to a felony conviction for failure to appear. *Stewart v. State*, 362 Ark. 400, 208 S.W.3d 768 (2005).

Circuit court erred in denying defendant's motion for a directed verdict because the offense of failure to appear could only be a Class C felony if the required appearance was in regard to a charge that had been filed, but not yet adjudicated, there was insufficient evidence supporting defendant's conviction, the return of service on the initial arrest warrant was never completed, and the appearance agreement, which was the basis for the charge, was signed only by defendant and the sheriff. *Thompson v. State*, 2014 Ark. 413, 464 S.W.3d 111 (2014).

**Cited:** *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986).



**5-54-121. Tampering with a public record.**

(a) A person commits the offense of tampering with a public record if, with the purpose of impairing the verity, legibility, or availability of a public record, he or she knowingly:

- (1) Makes a false entry in or falsely alters any public record; or
- (2) Erases, obliterates, removes, destroys, or conceals a public record.

(b)(1)(A) Tampering with a public record is a Class C felony if the public record is a court record.

(B) Tampering with a public record is a Class B felony if the public record is a court record and the person broke into any building or structure with the intent of tampering with a court record located in the building or structure.

(2) Otherwise, tampering with a public record is a Class D felony.

**History.** Acts 1975, No. 280, § 2821;  
A.S.A. 1947, § 41-2821; Acts 1987, No. 37,  
§ 1; 1999, No. 1104, § 1.

**CASE NOTES**

**Cited:** *Hester v. Langston*, 297 Ark. 87,  
759 S.W.2d 797 (1988).

**5-54-122. Filing false report with law enforcement agency.**

(a) As used in this section, “report” means any communication, either written or oral, sworn or unsworn.

(b) A person commits the offense of filing a false report if he or she files a report with any law enforcement agency or prosecuting attorney’s office of any alleged criminal wrongdoing on the part of another person knowing that the report is false.

(c)(1) Filing a false report is a Class D felony if:

(A) The alleged criminal wrongdoing is a capital offense, Class Y felony, Class A felony, or Class B felony;

(B) The law enforcement agency or prosecuting attorney’s office to whom the false report is made has expended in excess of five hundred dollars (\$500) in order to investigate the false report, including the costs of labor;

(C) Physical injury results to any person as a result of the false report;

(D) The false report is made in an effort by the person filing the false report to conceal his or her own criminal activity; or

(E) The false report results in another person being arrested.

(2) Otherwise, filing a false report is a Class A misdemeanor.

**History.** Acts 1989, No. 690, §§ 1-3;  
2007, No. 827, § 46.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey,  
Criminal Law, 12 U. Ark. Little Rock L.J.  
617.

## CASE NOTES

## ANALYSIS

Construction.  
Argument on Appeal.  
Class D Felony.  
Evidence.  
Hearsay Exceptions.  
Informer.

**Construction.**

There can be a violation of this section even when the false statement is made by a person other than the one who actually calls the police to report the crime. *Stephens v. State*, 328 Ark. 570, 944 S.W.2d 836 (1997).

**Argument on Appeal.**

Defendant's argument at trial was that two statements did not conflict and that the State did not prove that her statement was false, and at no time did she contend that the State's proof was lacking due to there only being proof of inconsistent statements made by her, for purposes of her false report conviction; she was limited on appeal to the scope of the argument she made in the trial court. *Ingram v. State*, 2014 Ark. App. 707, 452 S.W.3d 595 (2014).

**Class D Felony.**

Defendant's false report resulted in the evidence presented of the man hours and cost to the police department, and this evidence was sufficient to prove an expenditure in excess of \$500, such that substantial evidence supported defendant's conviction of a Class D felony; her argument regarding Class Y, A, or B felonies did not need to be addressed because the expenditure in excess of \$500 satisfied subdivision (c)(1) of this section in elevating filing a false report to a Class D felony. *Ingram v. State*, 2014 Ark. App. 707, 452 S.W.3d 595 (2014).

**Evidence.**

Defendant violated this section even though she did not make the call to the

police regarding an alleged theft, where her false statements to the victim and the police were the sole links that connected another to the disappearance of money. *Stephens v. State*, 328 Ark. 570, 944 S.W.2d 836 (1997).

Where defendant initially told police that he saw a man murder the victim, then said that he himself shot the victim four times and, with the help of an accomplice, disposed of the body in a creek, and later stated to police that his own father had killed the victim, resulting in his father's arrest, defendant's statements constituted filing a false report within the meaning of this section. *Curry v. State*, 89 Ark. App. 176, 201 S.W.3d 429 (2005).

Defendant's conviction for filing a false police report under subdivision (c)(1)(D) of this section was modified to reflect the misdemeanor offense of filing a false police report under subdivision (c)(2) where the state failed to prove that defendant was attempting to defraud her bank out of money in addition to filing a false police report; the bank employee never testified that defendant tried to defraud the bank out of money, only that defendant reported some fraudulent activity on her account. *Boveia v. State*, 94 Ark. App. 252, 228 S.W.3d 550 (2006).

Evidence was sufficient to support defendant's conviction for filing a false police report because an officer testified that defendant abandoned his vehicle during an attempted traffic stop, the car was then impounded, and several days later, defendant reported the vehicle stolen. Thus, because defendant abandoned the vehicle, he knew at the time of his report that it had not been stolen. *Butler v. State*, 2011 Ark. App. 708 (2011).

Substantial evidence supported the circuit court's adjudication of a juvenile defendant as delinquent for filing a false report of rape, given the content of the text messages from the night of the incident and defendant's admission that she had agreed to have sex. The circuit court

could have reasonably concluded that defendant did not provide text messages because she knew that they were inconsistent with her report of rape. Also, defendant's conduct after being confronted with those text messages suggested that she knew her report to the police was false. *S.C. v. State*, 2015 Ark. App. 344, 464 S.W.3d 477 (2015).

#### **Hearsay Exceptions.**

Statement was not admissible under Evid. Rule 804(b)(3) as a statement against penal interest because it tended to subject declarant to prosecution under this section; this section does not punish

the declarant who makes a true statement, only a false one, whereas admission of statement under Evid. Rule 804(b)(3) is based on the philosophy that the statement is true because its making may subject the declarant to civil or criminal liability. *Foreman v. State*, 321 Ark. 167, 901 S.W.2d 802 (1995).

#### **Informer.**

A citizen informant's tip ranked high on the probable cause reliability scale because he exposed himself to potential prosecution if he were to violate this section. *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998).

### **5-54-123, 5-54-124. [Reserved.]**

### **5-54-125. Fleeing.**

(a) If a person knows that his or her immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of the person to refrain from fleeing, either on foot or by means of any vehicle or conveyance.

(b) Fleeing is a separate offense and is not considered a lesser included offense or component offense with relation to other offenses which may occur simultaneously with the fleeing.

(c) Fleeing on foot is considered a Class C misdemeanor, except under the following conditions:

(1) If the defendant has been previously convicted of fleeing on foot anytime within the past one-year period, a subsequent fleeing on foot offense is a Class B misdemeanor;

(2) If property damage occurs as a direct result of the fleeing on foot, the fleeing on foot offense is a Class A misdemeanor; or

(3) If serious physical injury occurs to any person as a direct result of the fleeing on foot, the fleeing on foot offense is a Class D felony.

(d)(1)(A) Fleeing by means of any vehicle or conveyance is considered a Class A misdemeanor.

(B) A person convicted under subdivision (d)(1)(A) of this section shall serve a minimum of two (2) days in jail.

(2) Fleeing by means of any vehicle or conveyance is considered a Class D felony if, under circumstances manifesting extreme indifference to the value of human life, a person purposely operates the vehicle or conveyance in such a manner that creates a substantial danger of death or serious physical injury to another person.

(3) If serious physical injury to any person occurs as a direct result of fleeing by means of any vehicle or conveyance, the fleeing by means of any vehicle or conveyance offense is a Class C felony.

(e) Regardless of the circumstances in subdivisions (c)(1)-(3) of this section, if the defendant is under twenty-one (21) years of age and has



not been previously convicted of fleeing, the offense of fleeing is a Class C misdemeanor.

(f) In addition to any other penalty, if the defendant is convicted of violating subsection (d) of this section, the court shall instruct the Office of Driver Services of the Department of Finance and Administration to suspend or revoke the defendant's driver's license for at least six (6) months but not more than one (1) year.

**History.** Acts 1977, No. 196, §§ 1, 2; 1993, No. 1217, § 1; 1995, No. 410, § 1; A.S.A. 1947, §§ 41-2822, 41-2823; Acts 2009, No. 1304, § 1.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

## CASE NOTES

### ANALYSIS

Evidence.  
Fleeing As Underlying Felony.  
Information.  
Review.  
Sentence.  
Unauthorized Sentence.

### Evidence.

Evidence sufficient to establish flight. *Johnson v. State*, 313 Ark. 308, 854 S.W.2d 336 (1993).

Evidence of "serious physical injury" held sufficient. *Witherspoon v. State*, 319 Ark. 313, 891 S.W.2d 371 (1995); *Weeks v. State*, 64 Ark. App. 1, 977 S.W.2d 241 (1998).

Where defendant ran a yield sign, narrowly escaped a collision, passed cars in a no-passing zone, drove on the wrong side of the street over a "blind" hill, ran two stop signs, lost control of his car when attempting to negotiate another turn and slid into a chain-link fence, evidence supported a charge of fleeing. *Pierce v. State*, 79 Ark. App. 263, 86 S.W.3d 1 (2002).

Evidence was sufficient to sustain defendant's fleeing conviction where a deputy saw a motorcycle run a stop sign and attempted to make a traffic stop, the driver of the motorcycle fled reaching speeds approaching 90 miles per hour, the driver successfully escaped on foot, and the deputy testified that he was able to positively identify defendant as the driver of the motorcycle. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; after an officer turned on his blue lights, defendant accelerated to a speed of 100 miles per hour and struck an SUV, causing it to flip and resulting in injuries to the driver, and that conduct sufficiently satisfied the elements of aggravated assault and fleeing. *Barber v. State*, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

Evidence was sufficient to sustain defendant's fleeing conviction because an officer testified that he saw a man whom he later identified as defendant flee on foot after an attempted traffic stop and found defendant's identification card and cell phone in the abandoned vehicle. *Butler v. State*, 2011 Ark. App. 708 (2011).

Evidence was sufficient that defendant's flight created a substantial danger because an officer testified that his vehicle crossed double-yellow lines, almost hit a car in heavy traffic, outran the pursuing officer who was traveling 70-80 miles per hour, seemed about to turn over, and ran three stop signs. *Sharpe v. State*, 2013 Ark. App. 436 (2013).

Trial court did not err in refusing to direct a verdict in defendant's favor on the offense of fleeing because, *inter alia*, defendant told an officer that after he and two other individuals robbed the victim, he took the victim's backpack to the car, and when the police pulled up, he ran; and the officer who responded to a 911 call regarding the incident testified that he found defendant and another man sitting below a culvert in a drainage area at the apartment complex. *Britt v. State*, 2015 Ark. App. 456 (2015).

Defendant's action of accelerating the truck after the officer activated his blue lights and continuing at a high rate of speed through a busy gas station parking lot past people who were standing outside of their vehicles pumping gas, failing to stop at a fairly busy intersection, and eventually fleeing on foot was sufficient to support defendant's conviction for fleeing under subdivision (d)(2) of this section. *Medley v. State*, 2016 Ark. App. 79 (2016).

#### **Fleeing As Underlying Felony.**

In a fleeing and manslaughter case where an officer died during a high speed pursuit of defendant, who fled from a store after stealing candy, the trial court did not err by submitting a manslaughter instruction as fleeing was an appropriate underlying felony to support a conviction under § 5-10-104. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

During defendant's trial, the court properly gave an instruction to the jury regarding manslaughter, in violation of § 5-10-104(4)(A), after an officer was killed in a high-speed chase; while the manslaughter charge might have arisen from the same events as felony fleeing, the legislature clearly intended that fleeing be punishable as a separate offense. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

Fleeing can serve as an underlying felony for another offense. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

Fleeing is not to merge into a larger crime. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

#### **Information.**

Amending the information to read "serious physical injury" rather than "personal injury" to conform to the 1993 amendment of subdivision (c)(3) after prosecution had presented its case in chief changed neither the degree nor the nature of the offense charged, and thus no error occurred. *Witherspoon v. State*, 319 Ark. 313, 891 S.W.2d 371 (1995).

#### **Review.**

Appellant's sufficiency argument was preserved only for his conviction of leaving the scene of an accident, as he did not challenge his identity in his directed verdict motion for the fleeing apprehension charge. *Flemons v. State*, 2013 Ark. App. 280 (2013).

#### **Sentence.**

Under Arkansas law, possession of a firearm by a felon is at most a class B felony, punishable by no more than 20 years. Unless the flight causes serious physical injury to another, fleeing by vehicle is at most a class D felony, punishable by up to six years. *United States v. Thomas*, 790 F.3d 784 (8th Cir. 2015).

#### **Unauthorized Sentence.**

Court entered an illegal sentence by sentencing the petitioner to seventy-two-months' imprisonment on a misdemeanor, because if property damage occurred as a direct result of fleeing on foot, the offense was a Class A misdemeanor, and a sentence for a Class A misdemeanor should not exceed one year. *Arter v. State*, 2012 Ark. App. 327, 414 S.W.3d 391 (2012).

**Cited:** *Elmore v. State*, 13 Ark. App. 221, 682 S.W.2d 758 (1985); *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989); *Shaw v. State*, 299 Ark. 474, 773 S.W.2d 827 (1989); *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996); *Jones v. State*, 332 Ark. 617, 967 S.W.2d 559 (1998); *Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008).

### **5-54-126. Killing or injuring animals used by law enforcement or search and rescue dogs.**

(a) Any person who:

(1) Purposely kills or physically injures;

(2) Purposely causes physical contact that is of a nature likely to cause physical injury to; or

(3) Attempts to cause physical contact that is of a nature likely to cause physical injury to,  
any animal owned by or used by a law enforcement agency or any search and rescue dog upon conviction is guilty of a Class D felony.

(b) A person who purposely interferes with or obstructs an animal owned by or used by a law enforcement agency or a search and rescue dog used by a law enforcement officer in the discharge or attempted discharge of his or her duties upon conviction is guilty of a Class A misdemeanor.

(c) As used in this section, “search and rescue dog” means a dog:

(1) In training for or trained for the purpose of search and rescue;

(2) Owned by an independent handler or member of a search and rescue team;

(3) Used in conjunction with a local law enforcement organization or an emergency services organization for the purpose of locating a missing person or evidence of arson;

(4) Trained for the purpose of locating controlled substances; or

(5) Trained to assist in the apprehension of persons alleged to have violated any law.

(d) A person guilty of violating this section is also required to make restitution to the law enforcement agency or owner of the animal that suffered a loss due to the violation, including without limitation reimbursement for veterinary bills, and the replacement cost of the animal if the animal is permanently disabled or killed as a result of the violation.

**History.** Acts 1985, No. 446, §§ 1, 2; 1987, No. 884, § 1; 1999, No. 571, § 1; A.S.A. 1947, §§ 41-2858, 41-2859; Acts 2009, No. 530, § 1.

### 5-54-127. [Repealed.]

**Publisher’s Notes.** This section, concerning an officer failing to execute process, was repealed by Acts 2005, No. 1994, § 520. The section was derived from Rev.

Stat., ch. 44, div. 5, art. 3, § 12; C. & M. Dig., § 2582; Pope’s Dig., § 3262; A.S.A. 1947, § 41-2853.

### 5-54-128. [Repealed.]

**Publisher’s Notes.** This section, concerning jailor refusing to receive prisoner, was repealed by Acts 1997, No. 1097, § 2. The section was derived from Rev. Stat.,

ch. 44, div. 5, art. 3, § 13; C. & M. Dig., § 2583; Pope’s Dig., § 3263; A.S.A. 1947, § 41-2851.

For current law, see § 12-41-503.

### 5-54-129. Search of persons and vehicles entering institutions.

It is lawful for a superintendent, warden, or jailor, or his or her duly authorized agent, to require, as a condition of admission, a reasonable search as permitted by the Arkansas Constitution and the United States Constitution of the person or vehicle of anyone seeking admis-



sion to, or to visit in, the Department of Community Correction, jails, state institutions, or other places where persons are confined.

**History.** Acts 1953, No. 88, § 3; A.S.A. 1947, § 41-2852; Acts 2005, No. 1994, § 494.

### CASE NOTES

#### Strip Searches.

While prison officials have the right to conduct reasonable searches of prison visitors, with far greater latitude than in other settings, the right to indiscriminately strip search anyone who enters is not and cannot be authorized. *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985).

Strip search of a mother who had been visiting her son on a weekly basis, without incident for several years and who had been strip searched before, and no contraband was ever discovered, was unreasonable and violated the Fourth Amendment to the U.S. Constitution. *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985).

#### 5-54-130. Radio voice privacy adapters.

(a) It is unlawful for any person other than a law enforcement officer or law enforcement agency, a fire department, the Department of Health, or an employee of a law enforcement agency, a fire department, or the Department of Health to own or operate or possess any radio equipment described as a voice privacy adapter or any other device capable of receiving and decoding police department, fire department, or Department of Health communications that have been transmitted through a voice privacy adapter.

(b) This section does not apply to any police department or agency, any other agency having law enforcement responsibility, a fire department of any political subdivision of this state, or to the Department of Health.

(c) Any person who violates this section is guilty of a violation and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500).

(d) As used in this section, “person” means any person, firm, corporation, association, club, copartnership, society, or any other organization.

**History.** Acts 1975, No. 973, §§ 1-4; A.S.A. 1947, §§ 41-2854 — 41-2857; Acts 2005, No. 1994, § 51; 2011, No. 178, § 1.

**Amendments.** The 2011 amendment, in (a), substituted “law enforcement agency, a fire department, the Department of Health, or an employee of a law enforcement agency, a fire department, or

the Department of Health” for “law enforcement agency, or fire department or employee of a law enforcement agency or fire department” and “police department, fire department, or Department of Health” for “police and fire department”; and added “or to the Department of Health” at the end of (b).

#### 5-54-131. Absconding.

(a) A person commits the offense of absconding if the person knowingly:

(1) Leaves a designated residence while under house arrest ordered as a condition of the person's release on a criminal offense by a court of competent jurisdiction; or

(2) Leaves a designated area while wearing an electronic monitoring device ordered as a condition of the person's release on a criminal offense by a:

(A) Court of competent jurisdiction; or

(B)(i) Sheriff or his or her designee.

(ii) A determination by a sheriff or his or her designee placing a person on electronic monitoring remains valid until changed by the sheriff or his or her designee.

(b) The offense of absconding is a Class D felony.

**History.** Acts 1993, No. 473, § 1; 1999, No. 755, § 1.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Criminal Law, 16 U. Ark. Little Rock L.J. 91.

### 5-54-132. Projecting a laser light on a law enforcement officer.

(a) It is unlawful for any person to knowingly cause a laser light beam, colored light beam, or other targeting, pointing, or spotting light beam, to be projected, displayed, or shined on a law enforcement officer while in the performance of the law enforcement officer's duties.

(b) Any person violating a provision of this section is guilty of a Class A misdemeanor.

**History.** Acts 1999, No. 1271, § 1.

## SUBCHAPTER 2 — TERRORISM

### SECTION.

5-54-201. Definitions.

5-54-202. Soliciting material support for terrorism — Providing material support for a terrorist act.

5-54-203. Making a terrorist threat.

5-54-204. Falsely communicating a terrorist threat.

5-54-205. Terrorism.

### SECTION.

5-54-206. Terrorism — Enhanced penalties.

5-54-207. Hindering prosecution of terrorism.

5-54-208. Exposing the public to toxic biological, chemical, or radioactive substances.

5-54-209. Use of a hoax substance.

5-54-210. Restitution.

**Effective Dates.** Acts 2003, No. 1342, § 6: Apr. 14, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the State of Arkansas' criminal

statutes do not adequately address terrorism, as terrorism is known since September 11, 2001. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of

the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; or (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of

time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

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### 5-54-201. Definitions.

As used in this subchapter:

(1) “Act of terrorism” means:

(A) Any act that causes or creates a risk of death or serious physical injury to five (5) or more persons;

(B) Any act that disables or destroys the usefulness or operation of any communications system;

(C) Any act or any series of two (2) or more acts committed in furtherance of a single intention, scheme, or design that disables or destroys the usefulness or operation of a computer network, computers, computer programs, or data used by:

(i) Any industry;

(ii) Any class of business;

(iii) Five (5) or more businesses;

(iv) The United States Government;

(v) State government;

(vi) Any unit of local government;

(vii) A public utility;

(viii) A manufacturer of pharmaceuticals;

(ix) A national defense contractor; or

(x) A manufacturer of chemical or biological products used in connection with agricultural production;

(D) Any act that disables or causes substantial damage to or destruction of any structure or facility used in or in connection with:

(i) Ground, air, or water transportation;

(ii) The production or distribution of electricity, gas, oil, or other fuel;

(iii) The treatment of sewage or the treatment or distribution of water; or

(iv) Controlling the flow of any body of water;

(E) Any act that causes substantial damage to or destruction of livestock or crops or a series of two (2) or more acts committed in furtherance of a single intention, scheme, or design which, in the aggregate, causes substantial damage to or destruction of livestock or crops;

(F) Any act that causes substantial damage to or destruction of:

(i) Any hospital; or

(ii) Any building or facility used by:

(a) The United States Government;

(b) State government;



- (c) Any unit of local government;
- (d) A national defense contractor;
- (e) A public utility; or

(f) A manufacturer of chemical or biological products used in or in connection with agricultural production or the storage or processing of agricultural products or the preparation of agricultural products for food or food products intended for resale or for feed for livestock; or

(G) Any act that causes damage of five hundred thousand dollars (\$500,000) or more to any building or set of buildings;

(2) "Agricultural production" means the breeding and growing of livestock and crops;

(3) "Agricultural products" means crops and livestock;

(4) "Biological products used in agriculture" means, but is not limited to, seeds, plants, and deoxyribonucleic acid (DNA) of plants or animals altered for use in crop or livestock breeding or production or which are sold, intended, designed, or produced for use in crop production;

(5) "Communications system" means any works, property, or material of any radio, telegraph, telephone, microwave, cable station, or system;

(6)(A) "Computer" means a device that accepts, processes, stores, retrieves, or outputs data.

(B) "Computer" includes, but is not limited to, auxiliary storage and telecommunications devices;

(7) "Computer network" means a set of related, remotely connected devices and any communications facilities including more than one (1) computer with the capability to transmit data among them through communication facilities;

(8) "Computer program" means a series of coded instructions or statements in a form acceptable to a computer that causes the computer to process data and supply the results of data processing;

(9)(A) "Data" means representations of information, knowledge, facts, concepts, or instructions, including program documentation, which are prepared in a formalized manner and are stored or processed in or transmitted by a computer.

(B) Data may be stored in any form including, but not limited to, magnetic or optical storage media, punch cards, or data stored internally in the memory of a computer;

(10) "Hoax substance" means any substance that would cause a reasonable person to believe that the substance is a:

- (A) Dangerous chemical or biological agent;
- (B) Poison;
- (C) Harmful radioactive substance; or
- (D) Similar substance;

(11) "Livestock" means animals bred or raised for human consumption;

(12) "Material support or resources" means:

- (A) Currency or other financial securities;

- (B) Financial services;
  - (C) Lodging;
  - (D) Training;
  - (E) Safe house;
  - (F) False documentation or identification;
  - (G) Communications equipment;
  - (H) Facilities;
  - (I) Weapons;
  - (J) Lethal substances;
  - (K) Explosives;
  - (L) Personnel;
  - (M) Transportation;
  - (N) Expert services or expert assistance; and
  - (O) Any other kind of physical assets or intangible property;
- (13)(A) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.
- (B) "Person" includes, without limitation, any:
- (i) Charitable organization, whether incorporated or unincorporated;
  - (ii) Professional fund raiser, professional solicitor, limited liability company, association, joint stock company, trust, trustee, or any group of people formally or informally affiliated or associated for a common purpose; and
  - (iii) Officer, director, partner, member, or agent of any person;
- (14) "Render criminal assistance" means to do any of the following with the purpose of preventing, hindering, or delaying the discovery or apprehension of a person whom he or she knows or believes has committed an offense under this subchapter or is being sought by law enforcement officials for the commission of an offense under this subchapter, or with the purpose to assist a person in profiting or benefiting from the commission of an offense under this subchapter:
- (A) Harbor or conceal the person;
  - (B) Warn the person of impending discovery or apprehension;
  - (C) Provide the person with:
    - (i) Money;
    - (ii) Transportation;
    - (iii) A weapon;
    - (iv) A disguise;
    - (v) False identification documents; or
    - (vi) Any other means of avoiding discovery or apprehension;
  - (D) Prevent or obstruct, by means of force, intimidation, or deception, anyone from performing an act that might aid in the discovery or apprehension of the person;
  - (E) Suppress, by any act of concealment, alteration, or destruction, any physical evidence that might aid in the discovery or apprehension of the person or in the lodging of a criminal charge against the person;
  - (F) Aid the person to protect or expeditiously profit from an advantage derived from the crime; or

(G)(i) Provide expert services or expert assistance to the person.

(ii) Providing expert services or expert assistance shall not be construed to apply to:

(a) A licensed attorney who discusses with a client the legal consequences of a proposed course of conduct or advises a client of legal or constitutional rights; or

(b) A licensed medical worker who provides emergency medical treatment to a person whom the licensed medical worker believes committed an offense under this subchapter if, as soon as reasonably practicable either before or after providing the medical treatment, the licensed medical worker notifies a law enforcement agency; and

(15) "Terrorist" means any person who engages in or is about to engage in a terrorist act with the purpose to intimidate or coerce a significant portion of the civilian population or influence the policy of a government or a unit of government.

**History.** Acts 2003, No. 1342, § 3;  
2007, No. 827, §§ 47, 48.

#### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Arkansas Anti-Terrorism Act of 2003, 26 U. Ark. Little Rock L. Rev. 374.

### 5-54-202. Soliciting material support for terrorism — Providing material support for a terrorist act.

(a)(1)(A) A person commits the offense of soliciting material support for terrorism if the person knowingly raises, solicits, or collects material support or resources knowing:

(i) That the material support or resources will be used, in whole or in part, to plan, prepare, carry out, or avoid apprehension for committing terrorism or causing a catastrophe as defined under § 5-38-202; or

(ii) That the material support or resources so raised, solicited, or collected will be used by an organization designated under 8 U.S.C. § 1189, as the list of organizations existed March 1, 2003, and that designates foreign terrorist organizations.

(B) It is not an element of the offense that the defendant knows that an organization has been designated under 8 U.S.C. § 1189, as it existed March 1, 2003.

(2) Soliciting material support for terrorism is a Class Y felony.

(b)(1) A person commits the offense of providing material support for a terrorist act if the person knowingly provides material support or resources to a person knowing that the person will use the material support or resources, in whole or in part, to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism or to cause a catastrophe as defined under § 5-38-202.

(2) Providing material support for a terrorist act is a Class Y felony.



**History.** Acts 2003, No. 1342, § 3.

### **5-54-203. Making a terrorist threat.**

(a) A person commits the offense of making a terrorist threat if, with the purpose to intimidate or coerce a civilian population or to influence the policy of a government or a unit of government by intimidation or coercion, the person in any manner knowingly threatens to commit or causes to be committed a terrorist act and thereby causes a reasonable expectation or fear of the imminent commission of a terrorist act or of another terrorist act.

(b) It is not a defense to a prosecution under this section that at the time the person made the terrorist threat, unknown to him or her it was impossible to carry out the threat, nor is it a defense that the threat was not made to a person who was a subject or intended victim of the threatened act.

(c) Making a terrorist threat is a Class A felony.

**History.** Acts 2003, No. 1342, § 3.

### **5-54-204. Falsely communicating a terrorist threat.**

(a) A person commits the offense of falsely communicating a terrorist threat if, in any manner, the person knowingly makes a threat to commit or cause to be committed a terrorist act or otherwise creates the impression or belief that a terrorist act is about to be or has been committed or in any manner knowingly makes a threat to commit or cause to be committed a catastrophe, as defined under § 5-38-202, that the person knows is false.

(b) Falsely communicating a terrorist threat is a Class B felony.

**History.** Acts 2003, No. 1342, § 3.

### **5-54-205. Terrorism.**

(a) A person commits the offense of terrorism if, with the intent to intimidate or coerce a civilian population, influence the policy of a unit of government by using intimidation or coercion, affect the conduct of a unit or level of government by intimidation or coercion, or retaliate against a civilian population or unit of government for a policy or conduct, the person:

(1) Knowingly commits an act of terrorism within this state; or

(2) While outside this state, knowingly commits an act of terrorism that takes effect within this state or produces substantial detrimental effects within this state.

(b) Terrorism is a Class Y felony.

**History.** Acts 2003, No. 1342, § 3.

**5-54-206. Terrorism — Enhanced penalties.**

(a) Any person who is found guilty of or who pleads guilty or nolo contendere to terrorism, § 5-54-205, may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the person's acts caused serious physical injury to a law enforcement officer, firefighter, or emergency service technician providing emergency assistance at the scene of the act of terrorism.

(b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person sentenced under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

**History.** Acts 2003, No. 1342, § 3;  
2007, No. 1047, § 2.

**5-54-207. Hindering prosecution of terrorism.**

(a) A person commits the offense of hindering prosecution of terrorism if the person renders criminal assistance to a person who has committed terrorism, § 5-54-205, or causing a catastrophe, § 5-38-202, when he or she knows that the person to whom he or she rendered criminal assistance engaged in an act of terrorism or caused a catastrophe.

(b)(1) Hindering prosecution of terrorism is a Class B felony.

(2) However, hindering prosecution of terrorism is a Class D felony if the defendant shows by a preponderance of the evidence that he or she stands to the person assisted in the relation of:

(A) Parent, child, brother, or sister or a corresponding step-relationship of the preceding relationships; or

(B) Husband and wife.

**History.** Acts 2003, No. 1342, § 3.

**5-54-208. Exposing the public to toxic biological, chemical, or radioactive substances.**

(a) A person commits the offense of exposing the public to toxic biological, chemical, or radioactive substances if the person knowingly delivers or causes the delivery of a biological, chemical, or radioactive substance to a governmental facility, school, business, hospital, office building, or similar facility open to the public with the purpose of causing bodily injury or evacuation of the facility.

(b) Exposing the public to toxic biological, chemical, or radioactive substances is a Class Y felony.

**History.** Acts 2003, No. 1342, § 3.

**5-54-209. Use of a hoax substance.**

(a) A person commits the offense of use of a hoax substance if the person knowingly delivers or causes the delivery of a hoax substance to a governmental facility, school, business, hospital, office building, or similar facility open to the public, or to a person's home, business, or place of work with the purpose of causing anxiety, unrest, fear, personal discomfort, or the evacuation of the facility.

(b) Use of a hoax substance is a Class D felony.

**History.** Acts 2003, No. 1342, § 3.

**5-54-210. Restitution.**

In addition to any other restitution ordered under § 5-4-205, the court may order that a person who violates this subchapter make restitution to the state or any of its political subdivisions for any cleanup costs associated with the commission of any offense in this subchapter.

**History.** Acts 2003, No. 1342, § 3.

**CHAPTER 55****FRAUD AGAINST THE GOVERNMENT****SUBCHAPTER.**

1. MEDICAID FRAUD ACT.
2. ILLEGAL FOOD COUPONS.
3. CLAIMS FOR BENEFITS.
4. PENALTIES FOR PLACING NAME OF ANOTHER PERSON ON PROPERTY ASSESSMENT TO AVOID FEES.
5. LOTTERY FRAUD.
6. ELECTION, PETITION, AND BALLOT FRAUD.

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**A.C.R.C. Notes.** This chapter was formerly entitled "Medicaid Fraud."

**CASE NOTES**

**Cited:** United States v. Brown, 763 F.2d 984 (8th Cir. 1985).

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**SUBCHAPTER 1 — MEDICAID FRAUD ACT****SECTION.**

- 5-55-101. Title.
- 5-55-102. Definitions.
- 5-55-103. Unlawful acts — Classification.
- 5-55-104. Records.

**SECTION.**

- 5-55-105. Liability of organizations.
- 5-55-106. Investigation by Attorney General.
- 5-55-107. Restitution.



## SECTION.

5-55-108. Civil penalties — Expenses.

5-55-109. Criminal penalties and civil penalties mutually exclusive.

5-55-110. Suspension of violators.

## SECTION.

5-55-111. Criminal acts constituting Medicaid fraud.

5-55-112. Disposition of offenders.

5-55-113. Reward for information.

5-55-114. Special deputy prosecutor.

**A.C.R.C. Notes.** Due to the addition of Subchapter 3 by Acts 1995, No. 862, and the transfer of former § 5-56-101 et seq. to be Subchapter 2, the preexisting provisions of this chapter have been designated as Subchapter 1.

**Preambles.** Acts 1979, No. 823, contained a preamble which read: “Whereas, the Attorney General and the Prosecuting Attorneys need specific legislation by which to eliminate fraud in the Arkansas Medicaid Program; and

“Whereas, the Commissioner of Arkansas Social Services, the Attorney General and the Prosecuting Attorneys need access to all Medicaid-related records of all recipients of benefits and/or claimants for payments under the Arkansas Medicaid Program;

“Now, therefore ...”

**Effective Dates.** Acts 1979, No. 823, § 13: Apr. 10, 1979. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate fraud in the Arkansas Medicaid Program and that immediate passage of this Act is necessary to protect the integrity of the program. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1993, No. 1291, § 13: Apr. 22, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate fraud in the Arkansas Medicaid Program and that immediate passage of this Act is necessary to protect the integrity of the program. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preser-

vation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1993, No. 1300, § 5: Apr. 23, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Attorney General and the prosecuting attorneys are in need of specific legislation by which to eliminate fraud in the Arkansas Medicaid Program and that immediate passage of this act is necessary to protect the integrity of the program. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 2003, No. 1122, § 2: Apr. 7, 2003. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the Medicaid Fraud Act is in immediate need of the revision to clarify an ambiguity in the law; and that the provisions of this act are essential to successful operations and activities of the Medicaid Fraud Control Unit and the Department of Human Services. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2011, No. 1154, § 3: Apr. 4, 2011. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the statutes authorizing procedures for the recovery of false or fraudulent Medicaid claims are in immediate need of this revision to encourage citizens of the state to help recover

public funds and Medicaid moneys that have been wrongfully misappropriated and will otherwise be lost forever; and that the provisions of this act are essential to successful operations and activities of the Medicaid Fraud Control Unit of the Attorney General's office and the Department of Human Services. Therefore, an emergency is declared to exist and this act being immediately necessary for the pres-

ervation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

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### 5-55-101. Title.

This subchapter shall be known and may be cited as the "Medicaid Fraud Act".

**History.** Acts 1979, No. 823, § 1; A.S.A. 1947, § 41-4401.

### 5-55-102. Definitions.

As used in this subchapter:

(1) "Arkansas Medicaid Program" means the program authorized under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., that provides for payments for medical goods or services on behalf of indigent families with dependent children and of aged, blind, or disabled individuals whose income and resources are insufficient to meet the cost of necessary medical services;

(2) "Claim" means any written or electronically submitted request or demand for reimbursement made to the Arkansas Medicaid Program by any provider or its fiscal agents for each good or service purported to have been provided to any Medicaid recipient whether or not the State of Arkansas provides any or no portion of the money that is requested or demanded;

(3) "Fiscal agents" means any individual, firm, corporation, professional association, partnership, organization, or other legal entity that, through a contractual relationship with the Department of Human Services and, thereby, the State of Arkansas receives, processes, and pays claims under the Arkansas Medicaid Program;

(4) "Medicaid recipient" means any individual in whose behalf any person claimed or received any payment from the Arkansas Medicaid Program or its fiscal agents, whether or not the individual was eligible for benefits under the Arkansas Medicaid Program;

(5) "Person" means any:

(A) Provider of goods or services under the Arkansas Medicaid Program or any employee of the provider, whether the provider be an individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity; or

(B) Individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity,

or any employee of any individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity, not a provider under the Arkansas Medicaid Program but that provides goods or services to a provider under the Arkansas Medicaid Program for which the provider submits claims to the Arkansas Medicaid Program or its fiscal agents; and

(6) “Records” means all documents including, but not limited to, medical documents and X-rays, developed by any person through the claimed provision of any goods or services to any Medicaid recipient.

**History.** Acts 1979, No. 823, § 2; A.S.A. 1947, § 41-4402; Acts 1993, No. 1291, §§ 1, 8.

### **5-55-103. Unlawful acts — Classification.**

(a)(1) It is unlawful for any person to commit Medicaid fraud as prohibited by § 5-55-111.

(2) Medicaid fraud is a:

(A) Class B felony if the aggregate amount of payments illegally claimed is two thousand five hundred dollars (\$2,500) or more; and

(B) Class C felony if the aggregate amount of payments illegally claimed is less than two thousand five hundred dollars (\$2,500) but more than two hundred dollars (\$200).

(3) Otherwise, Medicaid fraud is a Class A misdemeanor.

(b)(1) A person commits illegal Medicaid participation if:

(A) Having been found guilty of or having pleaded guilty or nolo contendere to the charge of Medicaid fraud, theft of public benefits, § 5-36-202, or abuse of adults, § 5-28-101 et seq., as defined in the Arkansas Criminal Code, § 5-1-101 et seq., that person participates directly or indirectly in the Arkansas Medicaid Program; or

(B) As a certified health provider, enrolled in the Arkansas Medicaid Program pursuant to Title XIX of the Social Security Act, as amended, 42 U.S.C. § 1396 et seq., or the fiscal agent of the certified health provider, employs, or engages as an independent contractor, or engages as a consultant, or otherwise permits the participation in the business activities of the certified health provider, any person who has pleaded guilty or nolo contendere to or has been found guilty of a charge of Medicaid fraud, theft of public benefits, § 5-36-202, or abuse of adults, § 5-28-101 et seq., as defined in the Arkansas Criminal Code, § 5-1-101 et seq.

(2) Illegal Medicaid participation is a:

(A) Class A misdemeanor for the first offense;

(B) Class D felony for the second offense; and

(C) Class C felony for the third offense and subsequent offenses.

**History.** Acts 1979, No. 823, § 3; A.S.A. 1947, § 41-4403; Acts 1993, No. 1291, § 2; 2003, No. 1122, § 1; 2007, No. 827, § 49.



RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Government, 26 U. Ark. Little Rock L. Legislation, 2003 Arkansas General Assembly, Criminal Law, Fraud Against Rev. 373.

5-55-104. Records.

(a) No potential Medicaid recipient is eligible for medical assistance unless he or she has authorized in writing the Director of the Department of Human Services to examine all records of the potential Medicaid recipient's own, or of those receiving or having received Medicaid benefits through him or her, whether or not the receipt of the benefits would be allowed by the Arkansas Medicaid Program, for the purpose of investigating whether any person may have committed the crime of Medicaid fraud or for use or potential use in any legal, administrative, or judicial proceeding.

(b) No person is eligible to receive any payment from the Arkansas Medicaid Program or its fiscal agents unless the person has authorized in writing the director to examine all records for the purpose of investigating whether any person may have committed the crime of Medicaid fraud or for use or for potential use in any legal, administrative, or judicial proceeding.

(c) The Attorney General and the prosecuting attorneys are allowed access to all records of persons and Medicaid recipients under the Arkansas Medicaid Program to which the director has access for the purpose of investigating whether any person may have committed the crime of Medicaid fraud or for use or potential use in any legal, administrative, or judicial proceeding.

(d) Notwithstanding any other law to the contrary, no person is subject to any civil or criminal liability for providing access to records to the director, the Attorney General, or the prosecuting attorneys.

(e) Records obtained by the director, the Attorney General, or the prosecuting attorneys pursuant to this subchapter are classified as confidential information and are not subject to outside review or release by any individual except when records are used or potentially to be used by any government entity in any legal, administrative, or judicial proceeding.

(f) All persons under the Arkansas Medicaid Program are required to maintain at their principal place of Medicaid business all records at least for a period of five (5) years from the date of claimed provision of any goods or services to any Medicaid recipient.

(g)(1) Any person found not to have maintained any records is guilty of a Class D felony if the unavailability of records impairs or obstructs the prosecution of a felony.

(2) Otherwise, the unavailability of records is a Class A misdemeanor.

**History.** Acts 1979, No. 823, § 10; A.S.A. 1947, § 41-4410; Acts 1993, No. 1291, §§ 3, 7.

### CASE NOTES

#### ANALYSIS

Consent.

Inspection of Records.

#### Consent.

Since this section and regulations clearly contemplate that audits may be conducted pursuant to a criminal investigation and since the pharmacy had at least constructive, if not actual, knowledge of the statute and agency policies and yet entered the contract and continued to participate in the program, they expressly consented to an inspection of their records undertaken to determine if they were committing Medicaid fraud. *United States v. Brown*, 763 F.2d 984 (8th Cir.), cert. denied, 474 U.S. 905, 106 S. Ct. 273, 88 L. Ed. 2d 234 (1985).

#### Inspection of Records.

Since pharmacy expressly consented to an audit of its records, even if undertaken

in the course of a criminal investigation, the warrantless inspection of its records was valid and could not have tainted a later search and seizure. *United States v. Brown*, 763 F.2d 984 (8th Cir.), cert. denied, 474 U.S. 905, 106 S. Ct. 273, 88 L. Ed. 2d 234 (1985).

The search and seizure of documentary evidence at a dentist's office did not violate the Fourth Amendment where the dentist had previously executed a contract with the state which provided that he would keep all records as provided by the state's provider manual, that he would disclose the extent of services provided to individuals (patients) receiving assistance under the Medicaid program, and that he would make all of his records available in order to satisfy audit requirements under the program. *Blackwell v. State*, 338 Ark. 671, 1 S.W.3d 399 (1999).

### 5-55-105. Liability of organizations.

In naming a person as a defendant under this subchapter, it is expressly intended that all of the provisions of §§ 5-2-501 — 5-2-503 apply.

**History.** Acts 1979, No. 823, § 5; A.S.A. 1947, § 41-4405.

### 5-55-106. Investigation by Attorney General.

The office of the Attorney General is the entity to which a case of suspected Medicaid fraud shall be referred by the Arkansas Medicaid Program or its fiscal agents for the purposes of investigation, civil action, or referral to the prosecuting attorney having criminal jurisdiction in the matter.

**History.** Acts 1979, No. 823, § 9; A.S.A. 1947, § 41-4409; Acts 1995, No. 894, § 2.

### 5-55-107. Restitution.

(a) In addition to any other fine that may be levied under § 5-4-201, any person found guilty of Medicaid fraud as described in this subchapter is required to:

(1) Make full restitution to the Department of Human Services; and  
(2)(A) Pay a mandatory fine in the amount of three (3) times the amount of all payments judicially found to have been illegally received from the Arkansas Medicaid Program or its fiscal agents.

(B) The mandatory fine shall be credited to the general revenues of the State of Arkansas.

(b)(1) In addition to any other fine mandated by this subchapter or that may be levied under § 5-4-201, any person found guilty of Medicaid fraud as described in this subchapter may be required to pay a fine into the State Treasury in any amount up to three thousand dollars (\$3,000) for each claim judicially found to be fraudulently submitted to the Arkansas Medicaid Program or its fiscal agents.

(2) A fine under subdivision (b)(1) of this section shall be credited to the general revenues of the State of Arkansas.

(c) For prosecutions brought under this subchapter, the following provisions apply:

(1) To enable the court to properly fix the amount of restitution, the prosecuting attorney after appropriate investigation, shall recommend an amount that would make the Arkansas Medicaid Program whole with respect to the money fraudulently received from the Arkansas Medicaid Program, including the expense of investigation and all other measurable monetary damages directly related to the offense;

(2) If the defendant disagrees with the recommendation of the prosecuting attorney, he or she is entitled to introduce evidence in mitigation of the amount recommended; and

(3) The monetary judgment for restitution, as provided in this subchapter, becomes a judgment against the offender and has the same force and effect as any other civil judgment recorded in this state.

(d)(1) The Attorney General has concurrent jurisdiction and authority with the prosecuting attorney to collect all fines and amounts of restitution levied pursuant to any criminal violation of this subchapter in the manner provided by § 5-4-204, with interest accruing on any amount of restitution to be made and any fine to be paid from and after default in the payment of the restitution or fine in the manner provided in § 16-65-114.

(2) However, this subsection is not in any way intended to affect the contempt power of any court.

**History.** Acts 1979, No. 823, § 4; A.S.A. 1947, § 41-4404; Acts 1993, No. 1291, § 4. **Cross References.** Medicaid Fraud False Claims Act, § 20-77-901 et seq.

## 5-55-108. Civil penalties — Expenses.

(a)(1) Any person against which any civil judgment is entered as the result of a civil action brought or threatened to be brought by the State of Arkansas, through the Attorney General, on a complaint alleging the person to have fraudulently received any payment from the Arkansas Medicaid Program or its fiscal agents, is required to pay a civil penalty in the amount of two (2) times the amount of all payments judicially



found to have been fraudulently received from the Arkansas Medicaid Program or its fiscal agents.

(2) Any penalty shall be paid into the State Treasury and credited to the General Revenue Fund.

(3) The judgment upon which the civil penalty is based shall be paid as restitution to the Department of Human Services.

(b)(1) Any person against which any civil judgment is entered as the result of a civil action brought or threatened to be brought by the State of Arkansas, through the Attorney General, on a complaint alleging the person to have fraudulently submitted any claim to the Arkansas Medicaid Program or its fiscal agents, may be required to pay a civil penalty into the State Treasury in any amount up to two thousand dollars (\$2,000) for each claim judicially found to have been fraudulently submitted to the Arkansas Medicaid Program or its fiscal agents.

(2) The entirety of the civil penalty shall be credited to the fund.

(c)(1) Any person against which any civil judgment is entered as the result of a civil action brought or threatened to be brought by the State of Arkansas, through the Attorney General, on a complaint alleging any fraudulent receipt of payment from or false claim submitted to the Arkansas Medicaid Program or its fiscal agents, may be required to pay into the State Treasury all reasonable expenses that the court determines have been necessarily incurred by the Attorney General in the enforcement of this subchapter.

(2) The entirety of the amount under subdivision (c)(1) of this section shall be credited to the fund.

**History.** Acts 1979, No. 823, § 6; A.S.A. 1947, § 41-4406.

### **5-55-109. Criminal penalties and civil penalties mutually exclusive.**

Section 5-55-107, which provides for additional criminal fines, and the Medicaid Fraud False Claims Act, § 20-77-901 et seq., which provides for civil penalties, shall not both be applied to the same payment received or claim made by any person under the Arkansas Medicaid Program or its fiscal agents.

**History.** Acts 1993, No. 1291, § 6.

**Publisher's Notes.** Former § 5-55-109, concerning the mutual exclusivity of criminal penalties and civil penalties, was

repealed by Acts 1993, No. 1291, § 8. The former section was derived from Acts 1979, No. 823, § 7; A.S.A. 1947, § 41-4407.

### **5-55-110. Suspension of violators.**

The Director of the Department of Human Services may suspend or revoke the provider agreement between the Department of Human Services and a person in the event the person is found guilty of violating a provision of this subchapter.

**History.** Acts 1979, No. 823, § 8; A.S.A. 1947, § 41-4408; Acts 1993, No. 1291, § 5.

### **5-55-111. Criminal acts constituting Medicaid fraud.**

A person commits Medicaid fraud when he or she:

(1) Purposely makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under the Arkansas Medicaid Program;

(2) At any time purposely makes or causes to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment under the Arkansas Medicaid Program;

(3) Having knowledge of the occurrence of any event affecting his or her initial or continued right to any benefit or payment under the Arkansas Medicaid Program, or the initial or continued right to any benefit or payment under the Arkansas Medicaid Program of any other individual in whose behalf he or she has applied for or is receiving the benefit or payment under the Arkansas Medicaid Program, purposely conceals or fails to disclose the event with an intent fraudulently to secure the benefit or payment under the Arkansas Medicaid Program either in a greater amount or quantity than is due or when no benefit or payment under the Arkansas Medicaid Program is authorized;

(4) Having made application to receive any benefit or payment under the Arkansas Medicaid Program for the use and benefit of another person and having received it, purposely converts the benefit or payment under the Arkansas Medicaid Program or any part of the benefit or payment under the Arkansas Medicaid Program to a use other than for the use and benefit of the other person;

(5) Purposely presents or causes to be presented a claim for a physician's service for which payment may be made under a program under the Arkansas Medicaid Program while knowing that the individual who furnished the service was not licensed as a physician;

(6) Purposely solicits or receives any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind:

(A) In return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid Program; or

(B) In return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid Program;

(7)(A) Purposely offers or pays any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, to any person to induce that person to:

(i) Refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid Program; or

(ii) Purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid Program.

(B) Subdivisions (7)(A)(i) and (ii) of this section do not apply to:

(i) A discount or other reduction in price obtained by a provider of services or other entity under the Arkansas Medicaid Program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under the Arkansas Medicaid Program;

(ii) Any amount paid by an employer to an employee who has a bona fide employment relationship with the employer for employment in the provision of covered items or services;

(iii) Any amount paid by a vendor of goods or services to a person authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under the Arkansas Medicaid Program if:

(a) The person has a written contract with each individual or entity that specifies the amount to be paid to the person and the amount may be a fixed amount or a fixed percentage of the value of the purchases made by each individual or entity under the contract; and

(b) In the case of an entity that is a provider of services as defined in § 20-9-101, the person discloses in such form and manner as the Director of the Department of Human Services requires to the entity and, upon request, to the director the amount received from each vendor with respect to purchases made by or on behalf of the entity; or

(iv) Any payment practice specified by the director promulgated pursuant to applicable federal or state law;

(8) Purposely makes or causes to be made, or induces or seeks to induce the making of, any false statement or representation of a material fact with respect to the conditions or operation of any institution, facility, or entity in order that the institution, facility, or entity may qualify either upon initial certification or upon recertification as a hospital, rural primary care hospital, skilled nursing facility, nursing facility, intermediate care facility for individuals with intellectual disabilities, home health agency, or other entity, including an eligible organization under applicable federal law for which certification is required, or with respect to information required pursuant to applicable federal and state law, rules, regulations, and provider agreements;

(9) Purposely:

(A) Charges, for any service provided to a patient under the Arkansas Medicaid Program, money or other consideration at a rate in excess of the rates established by the state; or

(B) Charges, solicits, accepts, or receives, in addition to any amount otherwise required to be paid under the Arkansas Medicaid Program, any gift, money, donation, or other consideration other than



a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to the patient:

(i) As a precondition of admitting a patient to a hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities; or

(ii) As a requirement for the patient's continued stay in a hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities when the cost of the services provided in the hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities to the patient is paid for in whole or in part under the Arkansas Medicaid Program; or

(10) Purposely makes or causes to be made any false statement or representation of a material fact in any application for a benefit or payment in violation of the rules, regulations, and provider agreements issued by the Arkansas Medicaid Program or its fiscal agents.

**History.** Acts 1993, No. 1291, § 6.

**Cross References.** Medicaid Fraud False Claims Act, § 20-77-901 et seq.

## CASE NOTES

### In General.

Impropriety requirement for tortious interference was not satisfied by the health services company's violation of the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b), and comparable Arkansas statutes, this section, and the Arkansas Medicaid Fraud False Claims Act, § 20-77-902; even though the company's policy,

which denied privileges to doctors who acquired or held an interest in a competitor hospital, created a disincentive for the doctors to maintain ownership in a competing hospital, the policy did not create a disincentive for them to refer their patients to facilities other than the company's hospitals. *Baptist Health v. Murphy*, 365 Ark. 115, 226 S.W.3d 800 (2006).

### 5-55-112. Disposition of offenders.

For a prosecution under this subchapter:

(1) The punishment shall be fixed by the finder of fact, whether a court or a jury; and

(2) Restitution shall be fixed by the court.

**History.** Acts 1993, No. 1291, § 6; 2005, No. 164, § 1.

### 5-55-113. Reward for information.

(a) The court may pay a person such sums, not exceeding ten percent (10%) of the aggregate penalty recovered, as the court may deem just, for information the person may have provided that led to detecting and bringing to trial and punishment a person guilty of violating the Medicaid fraud laws.

(b)(1) Upon the disposition of any criminal action relating to a violation of this subchapter in which a penalty is recovered, the Attorney General may petition the court on behalf of a person who may

have provided information that led to detecting and bringing to trial and punishment a person guilty of Medicaid fraud to award the person in an amount commensurate with the quality and usefulness of the information determined by the court to have been provided, in accordance with the requirements of this subchapter.

(2) If the Attorney General elects not to petition the court on behalf of the person, the person may petition the court on his or her own behalf.

(c) Neither the state nor any defendant within the action is liable for expenses that a person incurs in bringing an action under this section.

(d) An employee or fiscal agents charged with the duty of referring or investigating a case of Medicaid fraud who are employed by or contract with any governmental entity are not eligible to receive a reward under this section.

**History.** Acts 1993, No. 1300, § 1; 2011, No. 1154, § 2.

**Amendments.** The 2011 amendment substituted “Reward for information” for “Reward for the detection and punish-

ment of medicaid fraud” in the section heading; and deleted “or in any case not more than one hundred thousand dollars (\$100,000)” following “the aggregate penalty recovered” in (a).

### **5-55-114. Special deputy prosecutor.**

(a) An attorney employed by the office of the Attorney General may be designated a special deputy prosecutor by the prosecuting attorney having criminal jurisdiction in the matter for the purposes of prosecuting in a court of competent jurisdiction an action brought under this subchapter.

(b)(1) As a special deputy prosecutor, the attorney may issue a subpoena and may administer an oath as provided in § 25-16-705.

(2) The subpoena shall be substantially in the form set forth in § 25-16-705(b).

(c) A special deputy prosecutor appointed and functioning as authorized under this section is entitled to the same immunity granted by law to the prosecuting attorney.

(d)(1) Appointment as a special deputy prosecutor does not enable the attorney to receive any additional fees or salary from the state for services provided pursuant to the appointment.

(2) Expenses of the special deputy prosecutor and any fees and costs incurred by the special deputy prosecutor in the prosecution of cases as provided in this section are the responsibility of the Attorney General.

(e) The prosecuting attorney may revoke the appointment of a special deputy prosecutor at any time.

**History.** Acts 1995, No. 894, § 2.

SUBCHAPTER 2 — ILLEGAL FOOD COUPONS

SECTION.

- 5-55-201. Traffic in illegal food coupons or vouchers.
- 5-55-202. Illegal use, transfer, acquisition, or possession of vouchers.
- 5-55-203. Illegal presentation of food coupons or vouchers for payment.

SECTION.

- 5-55-204. Penalties for food stamp trafficking.
- 5-55-205. Abuse of Special Supplemental Nutrition Program for Women, Infants and Children (WIC).

**A.C.R.C. Notes.** This subchapter was formerly codified as § 5-56-101 et seq. Due to the addition of Subchapter 3 by Acts 1995, No. 862, and the transfer of former § 5-56-101 et seq. to this subchapter, the preexisting provisions of this chapter have been designated as Subchapter 1.

**Effective Dates.** Acts 1997, No. 1058, § 33: July 1, 1997. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the United States Congress has amended the laws pertaining to certain federally funded public assistance pro-

grams; that these programs are crucial to the life and health of many needy citizens of the State of Arkansas who otherwise will be unable to obtain food, clothing, shelter, or medical care; that federal law mandates participating states to implement new public assistance programs on or before July 1, 1997, or forfeit federal funding necessary for such programs; that this act so provides. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect on July 1, 1997.”

5-55-201. Traffic in illegal food coupons or vouchers.

- (a)(1) Any individual, partnership, corporation, or other legal entity that issues food coupons in a manner not authorized by federal law and regulations or state law and regulations or that uses, transfers, acquires, possesses, or presents any food coupons for payment not authorized by federal and state law or federal and state regulations is guilty of a Class D felony.
- (2) However, if the food coupons are of a value of less than one hundred dollars (\$100), the individual, partnership, corporation, or other legal entity is guilty of a Class A misdemeanor.
- (b) Any individual, partnership, corporation, or other legal entity that issues a voucher used in the federal Special Supplemental Nutrition Program for Women, Infants and Children (WIC) in a manner not authorized by federal law and regulations or state law and regulations or that uses, transfers, acquires, possesses, or presents any voucher used in the federal Special Supplemental Nutrition Program for Women, Infants and Children (WIC) for payment not authorized by federal and state law or federal and state regulations is guilty of a Class A misdemeanor.



(c) As used in this subchapter, “food coupons” means any printed material, magnetically encoded instrument, or other device or process issued by the Department of Human Services or its successors, the purpose of which is to permit the purchase of food as provided for by the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq., or regulations promulgated pursuant to the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq.

**History.** Acts 1979, No. 714, § 1; A.S.A. 2005, No. 1994, § 426.  
1947, § 41-4301; Acts 1993, No. 489, § 1; **A.C.R.C. Notes.** This section was for-  
1995, No. 126, § 1; 1995, No. 345, § 1; merly codified as § 5-56-101.

### **5-55-202. Illegal use, transfer, acquisition, or possession of vouchers.**

Any person who knowingly uses, transfers, acquires, or possesses vouchers in any manner not authorized by the federal Special Supplemental Nutrition Program for Women, Infants and Children (WIC) authorized by the Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., as amended, or federal and state regulations issued pursuant to the Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., if the vouchers are of a value of less than one hundred dollars (\$100), is guilty of a Class A misdemeanor.

**History.** Acts 1979, No. 714, § 2; A.S.A. 2005, No. 1994, § 222.  
1947, § 41-4302; Acts 1993, No. 489, § 2; **A.C.R.C. Notes.** This section was for-  
merly codified as § 5-56-102.

### **5-55-203. Illegal presentation of food coupons or vouchers for payment.**

(a)(1) Any person who presents or causes to be presented food coupons for payment or redemption of the value of one hundred dollars (\$100) or more knowing the food coupons to have been received, transferred, or used in any manner in violation of a provision of the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq., or the federal or state regulations issued pursuant to the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq., is guilty of a Class D felony.

(2) However, if the food coupons are of a value of less than one hundred dollars (\$100), the person is guilty of a Class A misdemeanor.

(b) Any person who presents or causes to be presented vouchers for payment or redemption of the value of one hundred dollars (\$100) or more knowing the vouchers to have been received, transferred, or used in any manner in violation of a provision of the federal Special Supplemental Nutrition Program for Women, Infants and Children (WIC) authorized by the Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., as amended, or the federal or state regulations issued pursuant to the Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., is guilty of a Class A misdemeanor.

**History.** Acts 1979, No. 714, § 3; A.S.A. 1947, § 41-4303; Acts 1993, No. 489, § 3; 2005, No. 1994, § 427. **A.C.R.C. Notes.** This section was formerly codified as § 5-56-103.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

#### 5-55-204. Penalties for food stamp trafficking.

In addition to the penalties set forth in this subchapter, any recipient of a food stamp found guilty of a violation set forth in this subchapter is ineligible for further participation in the food stamp program, as follows:

- (1) For a period of one (1) year, upon the first occasion of any offense;
- (2) For a period of two (2) years, upon the second occasion of any offense; and
- (3) Permanently, upon the third occasion of any offense.

**History.** Acts 1993, No. 272, § 1; 1997, No. 1058, § 27. **A.C.R.C. Notes.** This section was formerly codified as § 5-56-104. **Cross References.** Public assistance generally, § 20-76-101 et seq.

#### 5-55-205. Abuse of Special Supplemental Nutrition Program for Women, Infants and Children (WIC).

(a)(1) A federal Special Supplemental Nutrition Program for Women, Infants and Children (WIC) participant who intentionally makes a false or misleading statement or intentionally conceals or withholds a fact to obtain a benefit, sells supplemental food or a voucher to, or exchanges supplemental food or a voucher with another individual or entity, receives from a food vendor cash or credit toward the purchase of an unauthorized item or other item of value in lieu of an authorized food, or physically abuses clinic or vendor staff may be disqualified from participation in the federal Special Supplemental Nutrition Program for Women, Infants and Children (WIC) for a specified period of time.

(2) The Department of Health shall establish sanctions for participant abuse.

(b)(1) A vendor who provides cash, an unauthorized food, or other item in lieu of an authorized supplemental food or who charges the state or local agency more for a supplemental food than another customer is charged for the same food item is disqualified from participation in the federal Special Supplemental Nutrition Program for Women, Infants and Children (WIC) for a specified period of time.

(2) The department shall establish sanctions for vendor abuse.

**History.** Acts 1993, No. 489, § 4. **A.C.R.C. Notes.** This section was formerly codified as § 5-56-105.

**SUBCHAPTER 3 — CLAIMS FOR BENEFITS**

## SECTION.

**5-55-301. Penalty — Notice — Prosecution.**

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**Effective Dates.** Acts 1995, No. 862, § 12: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1995 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an

extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1995 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

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**5-55-301. Penalty — Notice — Prosecution.**

(a)(1) It is unlawful for any person to knowingly make any material false statement or representation to the State Department for Social Security Administration Disability Determination for the purpose of:

(A) Obtaining any benefit or payment;

(B) Defeating or wrongfully increasing or wrongfully decreasing any claim for benefit or payment; or

(C) Aiding and abetting another person in violation of subdivision (a)(1)(A) or subdivision (a)(1)(B) of this section.

(2) Upon conviction, a person who violates subdivision (a)(1) of this section is guilty of a Class D felony.

(b) A copy of subsection (a) of this section shall be placed on all forms prescribed by the State Department for Social Security Administration Disability Determination for the use of a person claiming a benefit, a provider participating in the claims process, and any other party involved in the claims process.

(c) When the department finds a violation of subsection (a) of this section, the Director of the State Department for Social Security Administration Disability Determination shall refer the matter for appropriate action to the prosecuting attorney of the district where the original claim was filed.

**History.** Acts 1995, No. 862, § 6; 2007, No. 827, § 50.



SUBCHAPTER 4 — PENALTIES FOR PLACING NAME OF ANOTHER PERSON ON  
PROPERTY ASSESSMENT TO AVOID FEES

SECTION.  
5-55-401. Penalties.

5-55-401. Penalties.

- (a) It is unlawful for any person to knowingly place the assessment of property under the name of another person in order to avoid the payment of a fee associated with the property.
- (b) A violation of this section is a Class B misdemeanor.

**History.** Acts 2001, No. 1369, § 1.

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of      ssembly, Criminal Law, 24 U. Ark. Little  
Legislation, 2001 Arkansas General As-      Rock L. Rev. 429.

SUBCHAPTER 5 — LOTTERY FRAUD

SECTION.  
5-55-501. Lottery fraud.

**Effective Dates.** Acts 2011, No. 207, § 31: Mar. 8, 2011. Emergency clause provides: “It is found and determined by the General Assembly of the State of Arkansas that increasing the number of Arkansans obtaining postsecondary credentials is critical to the economic health of the state and its citizens; that the Arkansas Scholarship Lottery provides the opportunity for tens of thousands of Arkansans to obtain postsecondary education; that the deadline for scholarship applications is June 1; that the financial integrity of the Arkansas Scholarship Lottery is critical to the continued existence of the scholarships; that the reporting and research provisions of this act are critical for timely decisions by the General Assembly on scholarship awards; and that this act is immediately necessary because the Department of Higher Education must promulgate rules to implement this act well before June 1, 2011, in order to provide eligible Arkansans the opportunity to apply for the scholarship. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and

safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”  
Acts 2015, No. 218, § 34: Feb. 26, 2015. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the stability of the Arkansas Scholarship Lottery is critical to the success of the Arkansas Academic Challenge Scholarship Program; that changes to the operational structure of the lottery are needed to improve the creditability and function of the lottery; and that this act is immediately necessary to ensure that the transition of lottery administration is as undistruptive as possible. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor

vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is

vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

### 5-55-501. Lottery fraud.

(a) As used in this subchapter:

(1) “Lottery” means the same as defined in § 23-115-103 of the Arkansas Scholarship Lottery Act, § 23-115-101 et seq.; and

(2) “Ticket or share” means the same as defined in § 23-115-103 of the Arkansas Scholarship Lottery Act, § 23-115-101 et seq.

(b) A person commits the offense of lottery fraud if he or she:

(1) Falsely makes, alters, forges, utters, passes, or counterfeits a ticket or share in a lottery with a purpose to defraud the Office of the Arkansas Lottery; or

(2) Purposely influences the winning of a lottery prize through the use of coercion, fraud, deception, or tampering with lottery equipment or materials.

(c) A violation of this section is a Class D felony.

(d) In addition to the fine for a conviction under § 5-4-201, a person convicted of a violation of this section is subject to an additional fine of not more than fifty thousand dollars (\$50,000).

**History.** Acts 2011, No. 207, § 1; 2015, No. 218, § 2.

substituted “Office of the Arkansas Lottery” for “Arkansas Lottery Commission” in (b)(1).

**Amendments.** The 2015 amendment

## SUBCHAPTER 6 — ELECTION, PETITION, AND BALLOT FRAUD

### SECTION.

5-55-601. Petition fraud.

5-55-602. Criminal impersonation in an election.

### 5-55-601. Petition fraud.

(a) As used in this section, “petition” means a petition under § 3-8-201 et seq., § 3-8-801 et seq., or § 7-9-101 et seq.

(b) A person commits the offense of petition fraud:

(1) If the person knowingly:

(A) Signs a name other than his or her name to a petition;

(B) Signs his or her name more than one (1) time to a petition; or

(C) Signs a petition when he or she is not legally entitled to sign the petition;

(2) If the person acting as a canvasser, notary, sponsor as defined under § 7-9-101, or agent of a sponsor:

(A) Signs a name other than his or her own to a petition;

(B) Prints a name, address, or birth date other than his or her own to a petition unless the signor requires assistance due to disability and the person complies with § 7-9-103;

(C) Solicits or obtains a signature to a petition knowing that the person signing is not qualified to sign the petition;

(D) Knowingly pays a person any form of compensation in exchange for signing a petition as a petitioner;

(E) Accepts or pays money or anything of value for obtaining signatures on a petition when the person acting as a canvasser, sponsor, or agent of a sponsor knows that the person acting as a canvasser's name or address is not included on the sponsor's list filed with the Secretary of State under § 7-9-601; or

(F) Knowingly misrepresents the purpose and effect of the petition or the measure affected for the purpose of causing a person to sign a petition;

(3) If the person acting as a canvasser knowingly makes a false statement on a petition verification form;

(4) If the person acting as a notary knowingly fails to witness a canvasser's affidavit by witnessing the signing of the instrument in person and either personally knowing the signor or by being presented with proof of the identity of the signer; or

(5) If the person acting as a sponsor files a petition or a part of a petition with the official charged with verifying the signatures knowing that the petition or part of the petition contains one (1) or more false or fraudulent signatures unless each false or fraudulent signature is clearly stricken by the sponsor before filing.

(c) Petition fraud is a Class A misdemeanor.

Acts 2013, No. 1432, § 9.

### **5-55-602. Criminal impersonation in an election.**

(a) A person commits the offense of criminal impersonation in an election if he or she knowingly impersonates another person in an attempt to vote in a city, school district, county, state, or federal election.

(b) Criminal impersonation in an election is a Class D felony.

**History.** Acts 2015, No. 1166, § 2.

## **CHAPTER 56**

### **ILLEGAL FOOD COUPONS**

#### **SECTION.**

5-56-101 — 5-56-105. [Transferred.]



**5-56-101 — 5-56-105. [Transferred.]**

**A.C.R.C. Notes.** This chapter has been transferred to § 5-55-201 et seq.

**CHAPTERS 57-59**

**[Reserved.]**

***SUBTITLE 6. OFFENSES AGAINST PUBLIC HEALTH,  
SAFETY, OR WELFARE*****CHAPTER 60****GENERAL PROVISIONS****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. INTENT TO DEFRAUD A DRUG OR ALCOHOL SCREENING TEST.

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**Publisher's Notes.** Because of the enactment of Subchapter 2 of this chapter by Acts 2003, No. 750, the preexisting provisions of this chapter have been designated as Subchapter 1.

**Cross References.** Fines, § 5-4-201.  
Term of imprisonment, § 5-4-401.

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**SUBCHAPTER 1 — GENERAL PROVISIONS****SECTION.**

- 5-60-101. Abuse of a corpse.  
5-60-102. Prohibition on sales and distribution of novelty lighters.  
5-60-103. Unlawful use of an unmanned aircraft system.  
5-60-104 — 5-60-109. [Reserved.]  
5-60-110. [Repealed.]  
5-60-111. [Repealed.]  
5-60-112. Misconduct on bus.  
5-60-113. [Repealed.]  
5-60-114. Open shafts or wells.  
5-60-115. Filling or covering abandoned water wells.  
5-60-116. Breathing, inhaling, possessing, selling, or drinking certain intoxicating compounds — Alcohol vaporizing devices prohibited.

**SECTION.**

- 5-60-117 — 5-60-119. [Repealed.]  
5-60-120. Interception and recording.  
5-60-121. Sale of hand-held laser pointer to minor.  
5-60-122. Possession of hand-held laser pointer by minor.  
5-60-123. Obstruction or interference with emergency medical personnel.  
5-60-124. Interference with emergency communication in the first degree.  
5-60-125. Interference with emergency communication in the second degree.

**Effective Dates.** Acts 1901, No. 167, § 3: effective 60 days after passage.

Acts 1905, No. 119, § 2: effective on passage.

Acts 1969, No. 34, § 6: Feb. 6, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that glue sniffing is a serious threat to the life and the health of our citizens; that many young people who are unfamiliar with the inherent dangers of glue sniffing experiment therewith and such experiments have resulted in death or permanent brain damage; and that it is essential to the preservation of the public health and safety of this State that reasonable standards be immediately established to prohibit the practice of glue sniffing and to establish reasonable regulations for the sale of products used in glue sniffing where the seller thereof has reason to believe that the person purchasing the same intends to use it for unlawful purposes. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety

shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 382, § 5: Mar. 2, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the misuse of hand-held laser pointers can cause serious injuries to the eye; that hand-held laser pointers can be mistaken for targeting devices on firearms; that the devices are relatively cheap and readily available to minors; and that most of the misuse of these devices has been by minors. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

## 5-60-101. Abuse of a corpse.

(a) A person commits abuse of a corpse if, except as authorized by law, he or she knowingly:

- (1) Disinters, removes, dissects, or mutilates a corpse; or
- (2)(A) Physically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities.

(B) A person who conceals a corpse in a manner offensive to a person of reasonable sensibilities that results in the corpse remaining concealed is continuing in a course of conduct under § 5-1-109(e)(1)(B).

(C)(i) As used in this section, "in a manner offensive to a person of reasonable sensibilities" means in a manner that is outside the normal practices of handling or disposing of a corpse.

(ii) "In a manner offensive to a person of reasonable sensibilities" includes without limitation the dismembering, submerging, or burning of a corpse.

(b) Abuse of a corpse is a Class C felony.

**History.** Acts 1975, No. 280, § 2920; A.S.A. 1947, § 41-2920; Acts 2011, No. 1003, § 1; 2011, No. 1158, § 1.

**Amendments.** The 2011 amendment by No. 1003 added the (a)(2)(A) designa-

tion; inserted "or conceals" in (a)(2)(A); and added (a)(2)(B).

The 2011 amendment by No. 1158 substituted "Class C felony" for "Class D felony" in (b).

## CASE NOTES

## ANALYSIS

Constitutionality.

Applicability.

Autopsy.

Evidence.

Statute of Limitations.

**Constitutionality.**

This section is not unconstitutionally vague, as it conveys fair and sufficient warning when measured by common understanding. *Dougan v. State*, 322 Ark. 384, 912 S.W.2d 400 (1995).

**Applicability.**

The legislature intended that this section cover defendant's placement of her baby's corpse in a dumpster, as such an act constitutes a form of mishandling, abuse, or neglect. There was sufficient proof from which the jury could have concluded that defendant's conduct amounted to physical mistreatment of a corpse in a manner offensive to a person of reasonable sensibilities. *Dougan v. State*, 322 Ark. 384, 912 S.W.2d 400 (1995).

**Autopsy.**

An insurer's right under an accident policy to make an autopsy was not barred by former section concerning the removal of a dead body from the grave. *Standard Accident Ins. Co. v. Rossi*, 35 F.2d 667 (8th Cir. 1929) (decision under prior law).

**Evidence.**

Evidence was sufficient to sustain defendant's conviction for abuse of a corpse, where the victim's remains were found in 55-gallon garbage bags, secured by duct tape, and covered with a tarp; defendant's mishandling or neglect of the victim's body constituted physical mistreatment that would offend a person of reasonable sensibilities. *Dailey v. State*, 101 Ark. App. 394, 278 S.W.3d 120 (2008).

Evidence did not support defendant's conviction for abuse of a corpse, as the delay in reporting the decedent's death (from 11:00 p.m. until after the decedent's children left for school the next morning) had no adverse affect on the decedent's family and defendant did not knowingly mistreat the corpse in a manner offensive to a person of reasonable sensibilities. *Hammonds v. State*, 2010 Ark. App. 465, 375 S.W.3d 713 (2010).

Circuit court's denial of defendant's directed-verdict motion on the abuse of a corpse charge was affirmed where the evidence showed that he had dug a grave near his home and buried the victim's body, thereby concealing her body, and, by finding him guilty of violating the statute, the jury concluded that he did so outside the normal practices of handling or disposing of a corpse. *Williams v. State*, 2015 Ark. 316, 468 S.W.3d 776 (2015).

**Statute of Limitations.**

Although beheading and dismembering a corpse fell within the confines of this section, defendant's conviction had to be dismissed because she was not charged with the crime before the three-year limitations period ran and the submerging of the body did not qualify as a continuing course of conduct crime to toll the limitations period. *McClanahan v. State*, 2009 Ark. App. 493, 324 S.W.3d 692 (2009), *aff'd*, 2010 Ark. 39, 358 S.W.3d 900 (2010) (decision under prior law).

Prosecution for abuse of a corpse under subsection (a) of this section was barred by the three-year statute of limitations under § 5-1-109(b)(2) because it was not a continuing-course-of-conduct crime; once defendant disposed of the body parts in a pond, she was no longer physically mistreating the corpse. *McClanahan v. State*, 2010 Ark. 39, 358 S.W.3d 900 (2010) (decision under prior law).

**5-60-102. Prohibition on sales and distribution of novelty lighters.**

(a)(1) As used in this section, "novelty lighter" means a product commonly used by consumers to ignite cigarettes, cigars, pipes, gas grills, or other combustible material that has entertaining audio or visual features that depict or resemble in physical form or function articles commonly recognized as appealing to or intended for use by



children ten (10) years of age or younger, including without limitation lighters that depict or resemble cartoon characters, toys, guns, watches, musical instruments, vehicles, toy animals, food, or beverages or that play musical notes or have flashing lights or other entertaining features.

(2) “Novelty lighter” does not include:

(A) A lighter manufactured before 1980; or

(B) A lighter that lacks a device necessary to produce combustion or a flame.

(b)(1) The retail sale, offer of retail sale, gift, or distribution of any novelty lighter in Arkansas is prohibited.

(2) Subdivision (b)(1) of this section does not apply to a novelty lighter that is:

(A) Being actively transported through the state; or

(B) Located in a warehouse closed to the public for purposes of retail sales.

(c) A person who pleads guilty or nolo contendere to or is found guilty of violating this section is guilty of a violation and shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500) for each offense and shall pay court costs.

**History.** Acts 2009, No. 329, § 1; 2013, inserted “gas grills, or other combustible material” in (a)(1).  
No. 232, § 1.

**Amendments.** The 2013 amendment

## 5-60-103. Unlawful use of an unmanned aircraft system.

(a) As used in this section:

(1) “Critical infrastructure” means:

(A) An electrical power generation or delivery system;

(B) A petroleum refinery;

(C) A chemical or rubber manufacturing facility; or

(D) A petroleum or chemical storage facility; and

(2)(A) “Unmanned aircraft system” means an unmanned, powered aircraft that:

(i) Does not carry a human operator;

(ii) Can be autonomous or remotely piloted or operated; and

(iii) Can be expendable or recoverable.

(B) “Unmanned aircraft system” does not include:

(i) A satellite orbiting the earth;

(ii) An unmanned aircraft system used by the federal government or a person who is acting pursuant to contract with the federal government to conduct surveillance of specific critical infrastructure;

(iii) An unmanned aircraft system used by the state after consultation with the Governor or a person who is acting under contract with the state to conduct surveillance of specific critical infrastructure;

(iv)(a) An unmanned aircraft system used pursuant to prior written authorization of the Arkansas Department of Emergency Management.

(b) The department shall provide standards for authorizations under subdivision (a)(2)(B)(iv)(a) of this section in rules adopted in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq., after consultation with the Governor;

(v) An unmanned aircraft system used under a certificate of authorization issued by the Federal Aviation Administration; or

(vi) An unmanned aircraft used by a law enforcement agency, emergency medical service agency, hazardous materials response team, disaster management agency, or other emergency management agency for the purpose of incident command, area reconnaissance, personnel and equipment deployment monitoring, training, or a related purpose.

(b) A person commits the offense of unlawful use of an unmanned aircraft system if he or she knowingly uses an unmanned aircraft system to conduct surveillance of, gather evidence or collect information about, or photographically or electronically record critical infrastructure without the prior written consent of the owner of the critical infrastructure.

(c) This section does not prohibit:

(1)(A) A person from using an unmanned aircraft system to conduct surveillance of, gather evidence or collect information about, or photographically or electronically record his or her own property that is:

(i) Located on his or her own immovable property; or

(ii) Located on immovable property owned by another person under a valid lease, servitude, right-of-way, right of use, permit, license, or other right.

(B) A third person retained by the owner of the property described in subdivision (c)(1)(A) of this section to conduct activities described in subdivision (c)(1)(A) of this section is not prohibited under this section from using an unmanned aircraft system to conduct the activities described in this subdivision (c)(1); or

(2) An insurance company or a person acting on behalf of an insurance company from using an unmanned aircraft system for purposes of underwriting an insurance risk or investigating damage to insured property.

(d) Unlawful use of an unmanned aircraft system is:

(1) A Class B misdemeanor; or

(2) A Class A misdemeanor for a second or subsequent offense.

**History.** Acts 2015, No. 1019, § 1.

**5-60-104 — 5-60-109. [Reserved.]**

**5-60-110. [Repealed.]**

**Publisher's Notes.** This section, concerning relinquishing a party line for emergency calls, was repealed by Acts 2005, No. 1994, § 543. The section was derived from Acts 1955, No. 240, §§ 1-3; A.S.A. 1947, §§ 41-2974 — 41-2976.

**5-60-111. [Repealed.]**

**Publisher’s Notes.** This section, concerning communicating a false alarm by means of citizen’s band radio, was repealed by Acts 2005, No. 1994, § 521. The section was derived from Acts 1977, No. 277, § 1; A.S.A. 1947, § 41-2921.

**5-60-112. Misconduct on bus.**

(a) As used in this section:

(1) “Bus” means any passenger bus or coach or other motor vehicle having a seating capacity of not fewer than fifteen (15) passengers operated by a bus transportation company for the purpose of carrying passengers or cargo for hire, but not to include a bus or coach utilized exclusively to transport children to and from schools;

(2)(A) “Bus transportation company” means any person, group of persons, or corporation providing for-hire transport to passengers or cargo by a bus upon a highway of this state.

(B) “Bus transportation company” includes a bus transportation facility owned or operated by a local public body, municipality, public corporation, board, and commission, except a school district established under the laws of this state.

(C) “Bus transportation company” does not include a company utilizing a bus for transporting children to and from school;

(3) “Charter” means a group of persons who, pursuant to a common purpose and under a single contract and at a fixed charge for the vehicle in accordance with a bus transportation company’s tariff, have acquired the exclusive use of a bus to travel together as a group to a specified destination; and

(4)(A) “Passenger” means any person served by a bus transportation company.

(B) “Passenger” includes a person accompanying or meeting another person who is transported by a bus transportation company and any person shipping or receiving cargo.

(b) It is unlawful while on a bus for any person to:

(1) Threaten a breach of the peace;

(2) Be under the influence of alcohol;

(3) Be unlawfully under the influence of a controlled substance;

(4) Ingest or have in his or her possession any controlled substance unless properly prescribed by a physician or medical facility;

(5) Drink intoxicating liquor of any kind in or upon any passenger bus, except a chartered bus; or

(6) Fail to obey a reasonable request or order of a bus driver or any authorized bus transportation company representative.

(c)(1) If any person violates any provision of subsection (b) of this section, the driver of the bus or person in charge may:

(A) Stop the bus at the place where the offense is committed or at the next regular or convenient stopping place of the bus; and

(B) Require the person to leave the bus.

(2) Any person violating any provision of subsection (b) of this section is deemed guilty of a Class C misdemeanor.



**History.** Acts 1983, No. 688, §§ 1, 2; A.S.A. 1947, §§ 41-2924, 41-2925; Acts 2005, No. 1994, § 495.

**5-60-113. [Repealed.]**

**Publisher's Notes.** This section, concerning using abusive language to a school bus driver, was repealed by Acts

2005, No. 1994, § 522. The section was derived from Acts 1977, No. 814, §§ 1, 2; A.S.A. 1947, §§ 41-2922, 41-2923.

**5-60-114. Open shafts or wells.**

(a) It is unlawful for any corporation, company, individual person, or association of persons to leave any shaft, well, or other opening uncovered on any unenclosed land.

(b) Any corporation, company, individual person, or association of persons who digs any shaft, well, or other opening, whether for the purpose of mining or other purpose, is required to securely enclose the opening or cover the opening and keep it covered with strong and sufficient covering.

(c) Any corporation, company, individual, person, or association of persons who violates a provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100) for any such offense and is liable to anyone who may lose any stock by the opening for two (2) times the appraised value of the stock.

**History.** Acts 1901, No. 167, §§ 1, 2, p. 320; 1905, No. 119, § 1, p. 312; C. & M. Dig., §§ 375, 376; Pope's Dig., §§ 399,

400; A.S.A. 1947, §§ 41-2951, 41-2952; Acts 2005, No. 1994, § 52.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Absolute Liability in Arkansas, 8 Ark. L. Rev. 83.

**CASE NOTES**

**ANALYSIS**

- Purpose.
- Applicability.
- Negligence.
- Possession.
- Use of Well.
- Well Dug by Another.

**Purpose.**  
The purpose of this statute was to protect animals running at large, and not to protect persons. *Kimbrough v. Johnson*, 182 Ark. 522, 32 S.W.2d 154 (1930).

**Applicability.**  
This section applies to a well or opening on a lot in a city or town occupied as a residence. *American Bldg. & Loan Ass'n v. State*, 147 Ark. 80, 226 S.W. 1056 (1921).  
While the statute applies to other openings than shafts or wells, it does not apply to the construction of sewers temporarily left open. *Campbell & Hengst v. Douthit*, 170 Ark. 358, 279 S.W. 1018 (1925).

**Negligence.**  
Liability may be imposed without reference to the question of negligence, it being

sufficient to show that an artificial well was dug on the land and that it was left exposed in a condition which might endanger livestock. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

#### **Possession.**

Liability does not depend upon the owner's actual possession of the land, his constructive possession by reason of ownership being sufficient. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

#### **Use of Well.**

It is unlawful to keep a well uncovered though it was not dug for mining purposes. *American Bldg. & Loan Ass'n v. State*, 147 Ark. 80, 226 S.W. 1056 (1921).

The fact that the well was being used as

a source of water supply does not relieve the owner from liability if he permitted it to remain uncovered on unenclosed land. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

#### **Well Dug by Another.**

An owner of land may be convicted under this section although he did not dig the well. *American Bldg. & Loan Ass'n v. State*, 147 Ark. 80, 226 S.W. 1056 (1921).

Liability is not dependent on the fact that the person or corporation against whom liability is sought to be imposed dug the well but may be incurred by permitting a well dug by another to remain uncovered. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

### **5-60-115. Filling or covering abandoned water wells.**

(a) When the owner of land abandons or ceases to use any dug water well located on the land, he or she shall either fill the well or place a sturdy cover over the well to prevent animals and persons from falling into the well.

(b) Any person who willfully fails or refuses to either fill or cover the well, as provided in subsection (a) of this section, is guilty of a violation and upon conviction is subject to a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00).

**History.** Acts 1967, No. 193, §§ 1, 2; A.S.A. 1947, §§ 41-3755, 41-3756; Acts 2005, No. 1994, § 52.

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Looney, Modification of Arkansas Water Law: Issues and Alternatives, 38 Ark. L. Rev. 221.

### **5-60-116. Breathing, inhaling, possessing, selling, or drinking certain intoxicating compounds — Alcohol vaporizing devices prohibited.**

(a)(1) It is unlawful for any person to knowingly:

(A) Breathe, inhale, or drink any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichlorathane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other similar substance or any gasoline or similar substance for the purpose of inducing a condition of intoxication, stupefaction, depression, giddiness, paralysis, irrational behavior, or in any manner changing, distorting, or disturbing the auditory, visual, or mental processes;

(B) Breathe or inhale any compound, liquid, or chemical containing ethyl alcohol for the purpose of inducing a condition of intoxication;

(C) Possess any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, ethyl alcohol, or any other substance that will induce a condition of intoxication through breathing or inhalation for the purpose of violating subdivision (a)(1)(A) or subdivision (a)(1)(B) of this section;

(D) Sell, offer for sale, deliver, give, or possess with the intent to sell, deliver, or give to any other person any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, ethyl alcohol, or any other substance that will induce a condition of intoxication through breathing or inhalation if he or she has reasonable cause to believe that the compound, liquid, or chemical sold, offered for sale, delivered, given, or possessed with the intent to sell, deliver, or give will be used for the purpose of violating subdivision (a)(1)(A) or subdivision (a)(1)(B) of this section; or

(E) Manufacture, sell, give, deliver, possess, or use an alcohol vaporizing device.

(2) For the purposes of this section, any condition induced as provided in subdivision (a)(1)(A) or subdivision (a)(1)(B) of this section is an intoxicated condition.

(b)(1) This section does not apply to any person who commits any act described in this section pursuant to the direction or prescription of a licensed physician or dentist authorized to direct or prescribe the act.

(2) This section does not apply to the inhalation of anesthesia for a medical purpose or dental purpose.

(c) Upon conviction, a person who violates this section is guilty of a Class B misdemeanor.

(d)(1) As used in this section, “alcohol vaporizing device” means a device, a machine, an apparatus, or an appliance that is designed or marketed for the purpose of mixing ethyl alcohol with pure or diluted oxygen or any other gas to produce an alcoholic vapor that a person can breathe or inhale.

(2) “Alcohol vaporizing device” does not include an inhaler, a nebulizer, an atomizer, or any other device that is designed and intended by the manufacturer to dispense either a substance prescribed by a licensed healthcare provider authorized by law to prescribe the substance or an over-the-counter medication approved under an over-the-counter drug monograph or a new drug application under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., as it existed on January 1, 2009.

(3) “Alcohol vaporizing device” includes an inhaler, a nebulizer, an atomizer, or any other device described in subdivision (d)(2) of this



section if the inhaler, nebulizer, or atomizer is used for the purpose of inducing a condition of intoxication through breathing or inhalation.

**History.** Acts 1969, No. 34, §§ 1-3; A.S.A. 1947, §§ 41-2963 — 41-2965; Acts 2005, No. 1994, § 381; 2009, No. 466, § 1.

**5-60-117 — 5-60-119. [Repealed.]**

**Publisher's Notes.** These sections, concerning endurance contests, X-ray shoe fitting equipment, and motion pictures shown on Sunday, were repealed by Acts 2005, No. 1994, § 544. The sections were derived from the following sources:  
 5-60-117. Acts 1935, No. 64, §§ 1, 2; Pope's Dig., §§ 3359, 3360; A.S.A. 1947, §§ 41-3751, 41-3752.

5-60-118. Acts 1959, No. 133, §§ 1, 2; A.S.A. 1947, §§ 41-3753, 41-3754.  
 5-60-119. Acts 1931, No. 315, § 1; Pope's Dig., § 4908; A.S.A. 1947, § 41-3851.  
 Section 5-60-119 was also repealed by Acts 2005, No. 448, § 1.

**5-60-120. Interception and recording.**

- (a) It is unlawful for a person to intercept a wire, landline, oral, telephonic communication, or wireless communication, and to record or possess a recording of the communication unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording.
- (b) Any violation of this section is a Class A misdemeanor.
- (c)(1) It is not unlawful for the act to be committed by a person acting under the color of law.
- (2) It is an exception to the application of subsection (a) of this section that an officer, employee, or agent of a public telephone utility or company that is licensed by a federal or state agency to provide wire or wireless telecommunication service to the public provides information, facilities, or technical assistance to a person acting under the color of law to intercept a wire, wireless, oral, or telephonic communication.
- (3) It is not unlawful under this section for an operator of a switchboard, or an officer, employee, or agent of any public telephone utility or telecommunications provider whose facilities are used in the transmission of a wire communication to intercept, disclose, or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the telecommunications provider or public telephone utility of the communication.
- (d) The provisions of this section do not apply to a:
  - (1) Telecommunication service offered by a telecommunications provider or public telephone utility; or
  - (2) Federal Communications Commission licensed amateur radio operator.
- (e) Nothing in this section shall be interpreted to prohibit or restrict a Federal Communications Commission licensed amateur radio opera-

tor or anyone operating a police scanner from intercepting a communication for pleasure.

(f) Consistent with the provisions of 18 U.S.C. § 2703, as it existed on January 1, 2003, the issuance of a court order for disclosure of a customer communication or record to a governmental entity requiring the information as part of an ongoing criminal investigation is not prohibited by the laws of this state.

(g) Consistent with the provisions of 18 U.S.C. §§ 3122 — 3127, as they existed on January 1, 2003, the issuance of a court order authorizing or approving the installation and use of a pen register or a trap-and-trace device as part of an ongoing criminal investigation is not prohibited by the laws of this state.

**History.** Acts 1993, No. 1006, §§ 1-5; 2001, No. 1190, § 1; 2001, No. 1773, § 1; 2001, No. 1823, § 1; 2003, No. 1087, § 7.

**A.C.R.C. Notes.** Pursuant to § 1-2-207, this section is set out as amended by Acts 2001, No. 1823, § 1. Subsection (a) of this section was also amended by Acts 2001, No. 1190, § 1, and Acts 2001, No. 1773, § 1. Acts 2001, No. 1190, § 1, amended subsection (a) to read as follows:

“(a) It shall be unlawful for a person to:

“(1) Intercept, unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception and recording:

“(A) A wire communication;

“(B) An oral communication; or

“(C) A telephonic communication, including a communication that utilizes the electromagnetic spectrum frequencies generally used by cordless telephone technology and generally used by cellular telephone technology; or

“(2) Record or possess a recording of such communication unless the person is

a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording.”

Acts 2001, No. 1773, § 1, amended subsection (a) to read as follows:

“(a) It shall be unlawful for a person to intercept a wire, oral, or telephonic communication, defined as communications that utilize the electromagnetic spectrum frequencies of forty-six to forty-nine megahertz (46-49 mghz.) generally used by cordless telephone technology and eight hundred forty to eight hundred eighty megahertz (840-880 mghz.) generally used by cellular telephone technology or that utilize the wire, cable, or landline telephone facilities or telecommunications network, and to record or possess a recording of such communication unless such a person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception and recording.”

**Cross References.** Wireless service theft prevention, § 5-36-301 et seq.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Computer Crimes, 26 U. Ark. Little Rock L. Rev. 361.

## CASE NOTES

## ANALYSIS

Evidence.

—Admissibility of Unlawful Recording.

**Evidence.**

Defendant admitted he placed a recording device on his ex-wife's telephone and recorded her incoming and outgoing calls, and he also kept some of the recordings in his home. Based on a preponderance of the evidence and the plain language of

this section, the appellate court affirmed the circuit court's revocation of defendant's probation. *Lewis v. State*, 336 Ark. 469, 986 S.W.2d 95 (1999).

**—Admissibility of Unlawful Recording.**

This section does not proscribe the admissibility of an unlawful recording of an electronic communication by a private citizen. *Elliott v. State*, 335 Ark. 387, 984 S.W.2d 362 (1998).

**5-60-121. Sale of hand-held laser pointer to minor.**

(a) It is unlawful to sell a hand-held laser pointer to a person under eighteen (18) years of age.

(b) Any person who violates this section is guilty of a violation punishable by a fine of one hundred dollars (\$100).

**History.** Acts 1999, No. 382, § 1.

**5-60-122. Possession of hand-held laser pointer by minor.**

(a) It is unlawful for a person under eighteen (18) years of age to possess a hand-held laser pointer without the supervision of a parent, guardian, or teacher.

(b) The hand-held laser pointer shall be seized by a law enforcement officer as contraband.

**History.** Acts 1999, No. 1408, § 1.

**Cross References.** Seizure by school

personnel of hand-held laser pointers, § 6-18-512.

**5-60-123. Obstruction or interference with emergency medical personnel.**

(a) It is unlawful for a person to obstruct or interfere with emergency medical services personnel, a rescue technician, or any other emergency medical care provider, whether governmental, private, or volunteer emergency medical personnel, in the performance of his or her rescue mission.

(b)(1) Obstruction or interference with emergency medical personnel by using or threatening to use physical force is a Class A misdemeanor.

(2) Obstruction or interference with emergency medical personnel other than by physical force or threatening physical force is a Class C misdemeanor.

**History.** Acts 2005, No. 1683, § 1; 2009, No. 689, § 2.



RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

**5-60-124. Interference with emergency communication in the first degree.**

(a) A person commits the offense of interference with emergency communication in the first degree if he or she knowingly displaces, damages, or disables another person’s telephone or other communication device with the purpose of defeating the other person’s ability to request with good cause emergency assistance from a law enforcement agency, medical facility, or other government agency or entity that provides emergency assistance.

(b) Interference with emergency communication in the first degree is a Class A misdemeanor.

**History.** Acts 2007, No. 162, § 1.

CASE NOTES

ANALYSIS

Evidence.  
—Sufficient.

**Evidence.**

—Sufficient.

Victim’s testimony and the circumstances of the domestic disturbance permitted a reasonable inference of defendant’s knowledge and purpose as to first-

degree interference with emergency communications. Defendant broke into the victim’s home, broke into the bathroom where the victim retreated, physically assaulted the victim, took the victim’s cell phone away and broke it, and threatened that, if the victim had called the police, defendant would kill the victim. *Adams v. State*, 2014 Ark. App. 308, 435 S.W.3d 520 (2014).

**5-60-125. Interference with emergency communication in the second degree.**

(a) A person commits the offense of interference with emergency communication in the second degree if he or she recklessly prevents, interrupts, disrupts, impedes, or interferes with another person’s attempt to request with good cause emergency assistance from a law enforcement agency, medical facility, or other government agency or entity that provides emergency assistance.

(b) Interference with emergency communication in the second degree is a Class B misdemeanor.

**History.** Acts 2007, No. 162, § 1.

## SUBCHAPTER 2 — INTENT TO DEFRAUD A DRUG OR ALCOHOL SCREENING TEST

### SECTION.

5-60-201. Unlawful activities.

5-60-202. Construction.

### 5-60-201. Unlawful activities.

(a)(1)(A) It is unlawful for a person to:

(i) Sell, give away, distribute, or market human or synthetic urine in this state or transport human or synthetic urine into this state with the intent of using the human or synthetic urine to defraud or cause deceitful results in a drug or alcohol screening test;

(ii) Attempt to foil or defeat a drug or alcohol screening test by substituting synthetic urine or substituting or spiking a human urine sample or by advertising urine sample substitution or human urine spiking devices or measures;

(iii) Adulterate a human urine sample or other human bodily fluid sample with the intent to defraud or cause deceitful results in a drug or alcohol screening test;

(iv) Possess adulterants which are intended to be used to adulterate a human urine sample or other human bodily fluid sample for the purpose of defrauding or causing deceitful results in a drug or alcohol screening test; or

(v) Sell or market an adulterant with the intent by the seller or marketer that the product be used to adulterate a human urine sample or other human bodily fluid sample for the purpose of defrauding or causing deceitful results in a drug or alcohol screening test.

(B) As used in this section, “adulterant” means a substance that is not expected to be in human urine or another human bodily fluid or a substance expected to be present in human urine or another human bodily fluid but that is at a concentration so high that it is not consistent with human urine or another human bodily fluid, including without limitation:

- (i) Bleach;
- (ii) Chromium;
- (iii) Creatinine;
- (iv) Detergent;
- (v) Glutaraldehyde;
- (vi) Glutaraldehyde/squalene;
- (vii) Hydrochloric acid;
- (viii) Hydroiodic acid;
- (ix) Iodine;
- (x) Nitrite;
- (xi) Peroxidase;
- (xii) Potassium dichromate;
- (xiii) Potassium nitrite;

- (xiv) Pyridinium chlorochromate; and
- (xv) Sodium nitrite.

(2) Upon conviction, a person who violates subdivision (a)(1)(A) of this section is guilty of a Class B misdemeanor.

(b) Intent to defraud or cause deceitful results in a drug or alcohol screening test is presumed if:

(1) A heating element or any other device used to thwart a drug screening test accompanies the sale, giving, distribution, or marketing of human or synthetic urine; or

(2) Instructions that provide a method for thwarting a drug screening test accompany the sale, giving, distribution, or marketing of human or synthetic urine.

**History.** Acts 2003, No. 750, § 1; 2009, No. 640, § 1.

## 5-60-202. Construction.

Nothing in this subchapter or §§ 20-7-309 and 20-7-310 shall be construed to encourage, conflict, or otherwise interfere with the preemption of state and local laws under any federal laws or United States Department of Transportation regulations related to drug testing procedures and confidentiality.

**History.** Acts 2003, No. 750, § 2.

# CHAPTER 61

## ABORTION

### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. PARTIAL-BIRTH ABORTION BAN ACT OF 1997. [REPEALED.]

**A.C.R.C. Notes.** Because of the enactment of Subchapter 2 by Acts 1997, No. 984, the preexisting provisions of this chapter have been designated as Subchapter 1.

**Cross References.** Abortion, Ark. Const. Amend. 68.

Concealing birth, § 5-26-203.

Licensing and inspection of abortion clinics, § 20-9-302.

Abortion, §§ 20-16-601 et seq., 20-16-701 et seq., 20-16-801 et seq., 20-16-1201 et seq. — 20-16-1701 et seq.

## RESEARCH REFERENCES

**Am. Jur.** 1 Am. Jur. 2d, Abortion, § 1 et seq.

**C.J.S.** 1 C.J.S., Abortion & B.C., § 4 et seq.

**U. Ark. Little Rock L.J.** Legislative Survey, Health Law, 8 U. Ark. Little Rock L.J. 583.



SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.  
5-61-101. Abortion only by licensed medi-  
cal practitioner.

SECTION.  
5-61-102. Unlawful abortion.

**A.C.R.C. Notes.** Because of the enact- chapter have been designated as Sub-  
ment of Subchapter 2 by Acts 1997, No. chapter 1.  
984, the preexisting provisions of this

5-61-101. Abortion only by licensed medical practitioner.

- (a) It is unlawful for any person to induce another person to have an abortion or to willfully terminate the pregnancy of a woman known to be pregnant with the intent to cause fetal death unless the person is licensed to practice medicine in the State of Arkansas.
- (b) Violation of subsection (a) of this section is a Class D felony.
- (c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

**History.** Acts 1983, No. 715, §§ 1, 2;  
A.S.A. 1947, § 41-2561; Acts 1999, No.  
1273, § 4.

5-61-102. Unlawful abortion.

- (a) It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.
- (b) Any person violating a provision of this section is guilty of a Class D felony.
- (c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

**History.** Acts 1969, No. 61, § 1; A.S.A. held unconstitutional, as applied to phy-  
1947, § 41-2553; Acts 1999, No. 1273, § 5; sicians, by *Smith v. Bentley*, 493 F. Supp.  
2005, No. 1994, § 428. 916 (E.D. Ark. 1980). See case notes.

**Publisher's Notes.** This section was

## CASE NOTES

## ANALYSIS

Constitutionality.  
Accomplice.  
Defense.  
Elements.  
Indictment.  
Presence of Accused.  
Proof.  
Standing.

**Constitutionality.**

The effect of the U. S. Supreme Court holdings on this section was to strike down the prohibition on abortion as against physicians during the period preceding approximately the end of the first trimester. *May v. State*, 254 Ark. 194, 492 S.W.2d 888, cert. denied, 414 U.S. 1024, 94 S. Ct. 448, 38 L. Ed. 2d 315 (1973).

This section could not be constitutionally applied to physicians since the statute does not provide, and is not capable of being construed to provide, the physicians with notice of the conduct which the State has the authority to declare criminal; however, the statute could be constitutionally applied to laymen. *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

**Accomplice.**

The victim of an abortion was not considered an accomplice to the crime under this section. *Heath v. State*, 249 Ark. 217, 459 S.W.2d 420 (1970), cert. denied, 404 U.S. 910, 92 S. Ct. 236, 30 L. Ed. 2d 183 (1971) (decision under prior law).

**Defense.**

Where the defendant prescribed or administered medicine to produce an abortion he is guilty, and it is no defense that the medicine was not taken or that it failed to produce an abortion. *Burris v. State*, 73 Ark. 453, 84 S.W. 723 (1904); *Clayton v. State*, 186 Ark. 713, 55 S.W.2d 88 (1932) (preceding decisions under prior law).

**Elements.**

In determination of question of an abortion the court must decide (1) Has abortion taken place? (2) Was it induced by an intentional act? (3) If the act was intentional, was the act justifiable or criminal? (4) Did the induced abortion injure health or destroy life? *McClure v. State*, 214 Ark.

159, 215 S.W.2d 524 (1948) (decision under prior law).

**Indictment.**

Indictment was defective to charge a felony under former similar statute in not alleging that the act was done "before the period of quickening," but it is good under the common law for a misdemeanor punishable by fine not exceeding one hundred dollars and imprisonment not exceeding three months. *Reed v. State*, 45 Ark. 333 (1885) (decision under prior law).

An indictment for administering drugs to produce abortion need not name the particular drug used. *Reed v. State*, 45 Ark. 333 (1885) (decision under prior law).

Indictment held not defective in failing to allege that the defendant administered the medicine with the intent to cause the abortion before the period of quickening. *Davis v. State*, 96 Ark. 7, 130 S.W. 547 (1910) (decision under prior law).

**Presence of Accused.**

One who sends medicine to a woman with child with intent to produce an abortion is guilty under this statute. *Burris v. State*, 73 Ark. 453, 84 S.W. 723 (1904) (decision under prior law).

Where the defendant sent medicine to bring about an abortion and directed a pregnant woman in person or by letter how to take it, he was guilty although he was not present at the time the medicine was delivered to or taken by her. *Clayton v. State*, 186 Ark. 713, 55 S.W.2d 88 (1932).

**Proof.**

Under an indictment for administering and prescribing medicine to produce an abortion, proof of either administering or prescribing is sufficient. *Clayton v. State*, 186 Ark. 713, 55 S.W.2d 88 (1932) (decision under prior law).

**Standing.**

A layman had no standing to personally attack the constitutionality of this section, because, as applied to him, it simply prohibited a layman from performing or inducing an abortion. *May v. State*, 254 Ark. 194, 492 S.W.2d 888, cert. denied, 414 U.S. 1024, 94 S. Ct. 448, 38 L. Ed. 2d 315 (1973).

Where plaintiff physicians sought to perform abortions on demand during the

first trimester of pregnancy without regard to the criteria for “legal abortions,” the risk of criminal prosecution and disciplinary action was sufficient to give the plaintiffs standing to challenge the constitutionality of the state’s criminal abortion statutes. *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

SUBCHAPTER 2 — PARTIAL-BIRTH ABORTION BAN ACT OF 1997

SECTION.  
5-61-201 — 5-61-204. [Repealed.]

5-61-201 — 5-61-204. [Repealed.]

**Publisher’s Notes.** This subchapter was repealed by Acts 2009, No. 196, § 2. The subchapter was derived from the following sources:

5-61-201. Acts 1997, No. 984, § 1.	5-61-202. Acts 1997, No. 984, § 2.
	5-61-203. Acts 1997, No. 984, § 3.
	5-61-204. Acts 1997, No. 984, § 4.
	For current law, see the Partial-Birth Abortion Ban Act, § 20-16-1201 et seq.

CHAPTER 62  
ANIMALS

SUBCHAPTER.  
1. GENERAL PROVISIONS.  
2. FARM ANIMAL AND RESEARCH FACILITIES.

**Cross References.** Fines, § 5-4-201. 38-118.  
Penalty for selling, etc., or killing of strays before expiration of time limit, § 2- Term of imprisonment, § 5-4-401.

RESEARCH REFERENCES

**Am. Jur.** 4 Am. Jur. 2d, Animals, § 23 et seq.  
**C.J.S.** 3B C.J.S., Animals, § 198 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.	SECTION.
5-62-101. [Repealed.]	possession.
5-62-102. Definitions.	5-62-109. Immunity — Veterinarians.
5-62-103. Offense of cruelty to animals.	5-62-110. [Repealed.]
5-62-104. Offense of aggravated cruelty to a dog, cat, or horse.	5-62-111. Prevention of cruelty.
5-62-105. Exemptions.	5-62-112. [Repealed.]
5-62-106. Disposition of animal.	5-62-113. [Repealed.]
5-62-107. Immunity for reporting cruelty to animals or aggravated cruelty to a dog, cat, or horse.	5-62-114, 5-62-115. [Repealed.]
5-62-108. Arrested persons — Animal	5-62-116. Diseased animals — Sale.
	5-62-117. Decompression chambers.
	5-62-118, 5-62-119. [Repealed.]
	5-62-120. Unlawful animal fighting.
	5-62-121. Transfer of certain chicks,



## SECTION.

ducklings, or rabbits.

5-62-122. Permitting livestock to run at large.

5-62-123. [Repealed.]

5-62-124. Unlawful bear exploitation.

## SECTION.

5-62-125. Unlawful dog attack.

5-62-126. Acts of God — Emergency conditions.

5-62-127. Removal of an animal's transmittal device.

**Publisher's Notes.** For Comments regarding the Criminal Code, see Commentaries Volume B.

**Effective Dates.** Acts 1879, No. 47, § 16; effective on passage.

**5-62-101. [Repealed.]**

**Publisher's Notes.** This section, concerning cruelty to animals, was repealed by Acts 2009, No. 33, § 2. The section was

derived from Acts 1975, No. 280, § 2918; 1983, No. 285, § 1; A.S.A. 1947, § 41-2918; Acts 2001, No. 1826, § 1.

**5-62-102. Definitions.**

As used in this subchapter:

(1) "Abandon" means to desert, surrender, forsake, or to give up absolutely;

(2) "Animal" means any living vertebrate creature, except human beings and fish;

(3) "Animal control officer" means an officer employed by or under contract with an agency of the state, county, municipality, or other governmental or political subdivision of the state that is responsible for animal control operations in its jurisdiction;

(4)(A) "Animal husbandry practices" means the breeding, raising, production, and management of animals.

(B) "Animal husbandry practices" includes without limitation dehorning, docking, and castration;

(5) "Animal identification" means the use of a microchip, tattoo, an ear tag, an ear notch, branding, or any similar technology to identify the owner of an animal and that is generally accepted for the breed, species, and type of animal being identified;

(6) "Appropriate place of custody" means any of the following within this state and, if practicable, within twenty (20) miles of the residence of the owner or other place owned by the owner:

(A) A nonprofit animal shelter;

(B) An animal pound;

(C) A location owned or managed by a society incorporated for the prevention of cruelty to animals;

(D) A location owned or managed by an agency of the state, county, municipality, or other governmental or political subdivision of the state that is responsible for animal control operations in its jurisdiction;

(E) A location owned or managed by a public or private custodian that provides shelter, care, and necessary medical treatment to an animal; or

(F) The residence or other place owned by the owner of the animal, if approved by written order of a court of competent jurisdiction;

(7) "Competitive activity" means a lawful activity that is generally recognized as having an established schedule of events involving competition of animals or exhibitions of animals;

(8) "Cruel mistreatment" means any act that causes or permits the continuation of unjustifiable pain or suffering;

(9) "Equine" means a horse, pony, mule, donkey, or hinny;

(10) "Equine activity" means:

(A) Equine participation in equine shows, fairs, competitions, performances, or parades that involve any breed of equine and any of the equine disciplines, including without limitation dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, pulling, cutting, polo, steeplechasing, endurance trail riding and western games, and hunting;

(B) Teaching and training activities of an equine show or rodeo;

(C) Boarding an equine;

(D) Riding, inspecting, or evaluating an equine owned by another person, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine; or

(E) Any activity that involves riding or hunting;

(11) "Euthanizing" means humanely killing an animal accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death, and administered by a licensed veterinarian or a euthanasia technician licensed by the federal Drug Enforcement Administration and certified by the Department of Health;

(12) "Humanely killing" means causing the death of an animal in a manner intended to limit the pain or suffering of the animal as much as reasonably possible under the circumstances;

(13) "Law enforcement officer" means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense;

(14) "Licensed veterinarian" means a veterinarian licensed to engage in the practice of veterinary medicine in Arkansas in accordance with applicable Arkansas laws;

(15) "Livestock" means a horse, mule, bovine animal, goat, sheep, swine, chicken, duck, or similar animal or fowl commonly raised or used for farm purposes;

(16) "Local law enforcement agency" means the police force of a municipality or the office of the county sheriff;

(17) "Owner" means a person that:

(A) Has a right of property or title in an animal;

(B) Keeps or harbors an animal;

(C) Has an animal in his, her, or its care;

(D) Acts as an animal's custodian; or

(E) Knowingly permits an animal to remain on or about any premises occupied by him or her or it;

(18) "Person" means an individual, company, partnership, limited liability company, joint venture, joint agreement, mutual association or other, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other private entity;

(19) "Professional pest control activities" means those activities governed by the Arkansas Pesticide Control Act, § 2-16-401 et seq., and the Arkansas Pest Control Law, § 17-37-101 et seq.;

(20) "Rodeo" means an event involving a practice accepted by the Professional Rodeo Cowboys Association on January 1, 2009; and

(21) "Torture" means:

(A) The knowing commission of physical injury to a dog, cat, or horse by the infliction of inhumane treatment or gross physical abuse, causing the dog, cat, or horse intensive or prolonged pain, serious physical injury, or thereby causing death; and

(B) Mutilating, maiming, burning, poisoning, drowning, or starving a dog, cat, or horse.

**History.** Acts 2009, No. 33, § 3; 2013, No. 1175, § 1.

**Amendments.** The 2013 amendment added "any of the following within this

state and, if practicable, within twenty (20) miles of the residence of the owner or other place owned by the owner" in the introductory language of (6).

### 5-62-103. Offense of cruelty to animals.

(a) A person commits the offense of cruelty to animals if he or she knowingly:

(1) Subjects any animal to cruel mistreatment;

(2) Kills or injures any animal owned by another person without legal privilege or consent of the owner;

(3) Abandons an animal at a location without providing for the animal's continued care;

(4) Fails to supply an animal in his or her custody with a sufficient quantity of wholesome food and water;

(5) Fails to provide an animal in his or her custody with adequate shelter that is consistent with the breed, species, and type of animal; or

(6) Carries or causes to be carried in or upon any motorized vehicle or boat an animal in a cruel or inhumane manner.

(b) For purposes of this section, each alleged act of the offense of cruelty to animals committed against more than one (1) animal may constitute a separate offense.

(c) Any person who pleads guilty or nolo contendere to or is found guilty of cruelty to animals is guilty of an unclassified misdemeanor and shall be:

(1) Fined no less than one hundred fifty dollars (\$150) and no more than one thousand dollars (\$1,000);



(2) Either:

(A) Imprisoned for no less than one (1) day and no more than one

(1) year in jail; or

(B) Ordered to complete community service; and

(3)(A) Both:

(i) Ordered to complete a psychiatric or psychological evaluation; and

(ii) If determined appropriate, psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(B) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person up to the jurisdictional limit of the court.

(d) Any person who pleads guilty or nolo contendere to or is found guilty of the offense of cruelty to animals for a second offense occurring within five (5) years of a previous offense of cruelty to animals or of any other equivalent penal offense of another state or foreign jurisdiction is guilty of an unclassified misdemeanor and shall be:

(1) Fined no less than four hundred dollars (\$400) and no more than one thousand dollars (\$1,000);

(2) Either:

(A) Imprisoned for no fewer than seven (7) days and no more than one (1) year; or

(B) Ordered to complete no fewer than thirty (30) days of community service; and

(3)(A) Both:

(i) Ordered to receive a psychiatric or psychological evaluation; and

(ii) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(B) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person up to the jurisdictional limit of the court.

(e) Any person who pleads guilty or nolo contendere to or is found guilty of the offense of cruelty to animals for a third offense occurring within five (5) years of a previous offense of cruelty to animals or of any other equivalent penal offense of another state or foreign jurisdiction is guilty of an unclassified misdemeanor and shall be:

(1) Fined no less than nine hundred dollars (\$900) and no more than one thousand dollars (\$1,000);

(2) Either:

(A) Imprisoned for no fewer than ninety (90) days and no more than one (1) year; or

(B) Ordered to complete no fewer than ninety (90) days of community service; and

(3)(A) Both:

(i) Ordered to receive a psychiatric or psychological evaluation; and

(ii) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(B) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person up to the jurisdictional limit of the court.

(f)(1) Any person who pleads guilty or nolo contendere to or is found guilty of cruelty to animals for a fourth or subsequent offense occurring within (5) five years of a previous offense of cruelty to animals or of any other equivalent penal offense of another state or foreign jurisdiction is guilty of a Class D felony and shall be:

(A) Ordered to receive a psychiatric or psychological evaluation; and

(B) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(2) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person.

(g)(1) For the sole purpose of calculating the number of previous offenses under subsections (d), (e), and (f) of this section, all offenses that are committed against one (1) or more animals and as part of the same criminal episode are a single offense.

(2) As used in this section, “criminal episode” means an act that constitutes the offense of cruelty to animals that is committed by a person against one (1) or more animals within a period of twenty-four (24) hours.

**History.** Acts 2009, No. 33, § 3; 2011, No. 1120, § 12. inserted (e)(3)(B) and redesignated the remaining subdivisions.

**Amendments.** The 2011 amendment

## RESEARCH REFERENCES

**ALR.** Challenges to Pre- and Post-Conviction Forfeitures and to Postconviction Restitution Under Animal Cruelty Statutes. 70 A.L.R.6th 329.

### 5-62-104. Offense of aggravated cruelty to a dog, cat, or horse.

(a) A person commits the offense of aggravated cruelty to a dog, cat, or horse if he or she knowingly tortures any dog, cat, or horse.

(b) A person who pleads guilty or nolo contendere to or is found guilty of aggravated cruelty to a dog, cat, or horse:

(1) Shall be guilty of a Class D felony;

(2) May be ordered to perform up to four hundred (400) hours of community service; and

(3) Both:

(A) Ordered to receive a psychiatric or psychological evaluation; and

(B) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(c) A person who pleads guilty or nolo contendere to or is found guilty of aggravated cruelty to a dog, cat, or horse for a subsequent offense occurring within five (5) years from a previous offense of aggravated cruelty to a dog, cat, or horse or of any other equivalent penal offense of another state or foreign jurisdiction is guilty of a Class C felony and shall be:

(1) Ordered to receive a psychiatric or psychological evaluation; and

(2) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(d) The cost of any psychiatric or psychological evaluation, counseling, or treatment ordered under this section shall be paid by the person ordered to receive the psychiatric or psychological evaluation, counseling, or treatment.

(e) For purposes of this section, each alleged act of the offense of aggravated cruelty to a dog, cat, or horse committed against more than one (1) dog, cat, or horse may constitute a separate offense.

(f)(1) For the sole purpose of calculating the number of previous offenses under subsection (b) of this section, all offenses of aggravated cruelty to a dog, cat, or horse that are committed against one (1) or more dogs, cats, or horses, as part of the same criminal episode are a single offense.

(2) As used in this section, “criminal episode” means an act that constitutes the offense of aggravated cruelty to a dog, cat, or horse, committed by a person against one (1) or more dogs, cats, or horses within a period of twenty-four (24) hours.

**History.** Acts 2009, No. 33, § 3.

## **5-62-105. Exemptions.**

(a) This subchapter does not prohibit any of the following activities:

(1) Reasonably acting to protect a person or a person’s property from damage;

(2) Injuring or humanely killing an animal on the property of a person if the person is acting as a reasonable person would act under similar circumstances and if the animal is reasonably believed to constitute a threat of physical injury or damage to any animal under the care or control of the person;

(3) Engaging in practices lawful under the Arkansas Veterinary Medical Practice Act, § 17-101-101 et seq., or engaging in activities by or at the direction of any licensed veterinarian while following accepted standards of practice of the profession, including the euthanizing of an animal;

(4) Rendering emergency care, treatment, or assistance, including humanely killing an animal, that is abandoned, ill, injured, or in



distress related to an accident or disaster, or where there appears to be no reasonable probability that the life or usefulness of the animal can be saved, if the person rendering the emergency care, treatment, or assistance is:

- (A) Acting in good faith;
- (B) Not receiving compensation; and
- (C) Acting as a reasonable person would act under similar circumstances;
- (5) Performing generally accepted animal husbandry practices;
- (6) Performing professional pest control activities in a lawful manner;
- (7) Performing generally accepted training for or participating in a rodeo, equine activity, or competitive activity;
- (8) Engaging in generally accepted practices of animal identification;
- (9) Engaging in the taking of game or fish through hunting, trapping, or fishing, or engaging in any other activity authorized by Arkansas Constitution, Amendment 35, by § 15-41-101 et seq., or by any Arkansas State Game and Fish Commission regulation promulgated under either Arkansas Constitution, Amendment 35, or statute;
- (10) Conducting activities undertaken by research and education facilities or institutions that are:
  - (A) Regulated under the Animal Welfare Act, 7 U.S.C. § 2131 et seq., as in effect on January 1, 2009;
  - (B) Regulated under the Health Research Extension Act of 1985, Pub. L. No. 99-158; or
  - (C) Subject to any federal law or regulation governing animal research that is in effect on January 1, 2009; and
- (11) Applying generally accepted methods used to train dogs engaged in hunting, field trials, service work, obedience training, or any similar activities authorized by the Arkansas State Game and Fish Commission.

(b) In addition to the exemptions in subsection (a) of this section, this subchapter does not prohibit a person from engaging in or performing conduct that is otherwise permitted under the laws of this state or of the United States, including without limitation agricultural activities, butchering, food processing, marketing, medical activities, zoological activities, or exhibitions.

**History.** Acts 2009, No. 33, § 3.

## RESEARCH REFERENCES

**ALR.** Validity, Construction, and Application of Animal Welfare Act (7 U.S.C. §§ 2131 et seq.). 74 A.L.R. Fed. 2d 275.

**5-62-106. Disposition of animal.**

(a)(1) Unless otherwise ordered by a court, for purposes of this subchapter, an animal that has been seized by a law enforcement officer or animal control officer under this subchapter shall remain at the appropriate place of custody for a period of at least fifteen (15) consecutive days, including weekends and holidays, after written notice is received by the owner.

(2) The written notice shall:

(A) Be left at the last known address of the owner; and

(B) Contain a description of the animal seized, the date seized, the name and contact information of the law enforcement or animal control officer seizing the animal, the location of the animal, and the reason for the seizure.

(3) If the owner of the animal cannot be determined, a written notice regarding the seizure of the animal shall be conspicuously posted where the animal is seized at the time the seizure occurs if practicable and a notice shall be published in a local newspaper of general circulation in the jurisdiction where the animal was seized at least two (2) times each week for two (2) consecutive weeks, with the first notice published within three (3) days of the seizure, and no less than at least five (5) days before a hearing conducted under this section.

(4)(A) After written notice is received by the owner or published under subdivision (a)(3) of this section, the owner within fifteen (15) business days may petition the district court having jurisdiction where the animal was seized to determine the custody of the animal.

(B) If a petition is not filed by the owner within the time period prescribed by this section, the prosecuting attorney shall file a petition in the district court to divest the owner of ownership of the animal and, after a hearing, the district court may order the animal transferred to an appropriate place of custody, euthanized, or any other disposition the district court deems appropriate.

(b)(1)(A) When an owner files a petition under subsection (a) of this section and the district court determines that the owner shall be divested of custody of the animal, the district court shall order the owner of the animal to post a bond with the district court in an amount the district court determines is sufficient to care for the animal for at least thirty (30) days.

(B) The bond shall not prevent the appropriate place of custody from disposing of the animal at the end of the thirty-day period covered by the bond, unless a person claiming an interest in the animal posts a new bond for an amount determined by the court for an additional thirty-day period.

(2)(A) If a petition has been filed by the owner of an animal or the prosecuting attorney under subsection (a) of this section, a person claiming an interest in an animal seized may prevent disposition of the animal as provided in subsection (a) of this section by posting a bond with the district court in an amount the district court determines is sufficient to care for the animal for at least thirty (30) days.

(B) If a person who claims an interest in the animal has not posted bond in accordance with subdivision (b)(2)(A) of this section, the district court shall determine final disposition of the animal in accordance with reasonable practices for the humane treatment of animals.

(c)(1) A diseased or injured animal:

(A) Seized under this section may be appropriately treated for injury or disease without a court order; and

(B) Is subject to being euthanized without a court order when it is determined by a licensed veterinarian that euthanizing is necessary to prevent the suffering of the animal.

(2)(A) Except as provided in subdivision (c)(1) of this section, an appropriate place of custody shall not alter or modify an animal in any manner, including without limitation the neutering, spaying, or castration of the animal, without:

(i) A written court order that is issued after a petition is filed by the prosecuting attorney requesting alteration or modification and a hearing involving all interested parties as set forth in subsection (a) of this section; or

(ii) The written consent of the owner.

(B) A violation of this subsection is a Class B misdemeanor.

(d)(1) If a person pleads guilty or nolo contendere to or is found guilty of either the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, and if that person is also the owner of the animal, the court shall divest the person of ownership of the animal, and the court shall either:

(A) Order the animal given to an appropriate place of custody;

(B) Order the animal euthanized if the court decides that the best interests of the animal or that the public health and safety would be best served by euthanizing the animal based on the sworn testimony of a licensed veterinarian or animal control officer; or

(C) Make any other disposition the court deems appropriate.

(2) If a person pleads guilty or nolo contendere to or is found guilty of either the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, and the person is not the owner of the animal, the court shall order that the animal be returned to the owner, if practicable, or, if not practicable, the court shall either:

(A) Order the animal given to an appropriate place of custody;

(B) Order the animal euthanized if the court decides that the best interests of the animal or that the public health and safety would be best served by euthanizing the animal based on the sworn testimony of a licensed veterinarian or animal control officer; or

(C) Make any other disposition the court deems appropriate.

(e) The court shall order an animal seized under this section returned to the owner if the owner:

(1) Filed a petition under subsection (a) of this section;

(2) Paid all reasonable expenses incurred in caring for the animal; and



- (3) Is found not guilty of the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, or the proceedings against the owner have otherwise terminated.
- (f) An owner of an animal that has been seized under this subchapter shall be responsible only for reasonable expenses that were incurred for the care of the animal while the animal was in the appropriate place of custody.
- (g) This section does not prohibit the return of an animal to the rightful owner if the rightful owner is located outside the state and the prosecuting attorney has decided not to charge the rightful owner with an offense under this subchapter.

**History.** Acts 2009, No. 33, § 3; 2013, No. 1160, § 1; 2013, No. 1175, § 2.

**Amendments.** The 2013 amendment

by No. 1160 added (f).  
The 2013 amendment by No. 1175 added (g).

RESEARCH REFERENCES

**ALR.** Challenges to Pre- and Post-Conviction Forfeitures and to Postconviction

Restitution Under Animal Cruelty Statutes. 70 A.L.R.6th 329.

CASE NOTES

**Jurisdiction.**

While it appeared defendant tried to originally avail herself of the proper procedure set forth in this section, once the district court dismissed her petition for lack of jurisdiction, the proper method for bringing the matter in circuit court would have been to file an appeal of the district

court’s order of dismissal in the circuit court, which was not done. Simply refileing the petitions in the pending criminal case in circuit court did not somehow confer jurisdiction on the circuit court. *Nance v. State*, 2014 Ark. 201, 433 S.W.3d 872 (2014).

5-62-107. Immunity for reporting cruelty to animals or aggravated cruelty to a dog, cat, or horse.

Except as provided in § 5-54-122, a person who in good faith reports a suspected incident of cruelty to animals, § 5-62-103, or aggravated cruelty to a dog, cat, or horse, § 5-62-104, to a local law enforcement agency or to the Department of Arkansas State Police is immune from civil and criminal liability for reporting the incident.

**History.** Acts 2009, No. 33, § 3.

5-62-108. Arrested persons — Animal possession.

(a) If a law enforcement officer arrests a person in charge of any vehicle drawn by or containing an animal, the law enforcement officer may seize the animal and impound in any lawful manner the vehicle and the contents of the vehicle.

(b)(1) A law enforcement officer that seizes an animal under subsection (a) of this section shall place the animal with an appropriate place of custody.

(2) If an animal is seized under this section, an owner of the animal may petition to regain possession of the animal in the manner prescribed in § 5-62-106.

(c) Any vehicle or contents of the vehicle impounded under subsection (a) of this section shall be returned to the owner as soon as reasonably practicable under the circumstances unless the vehicle or contents of the vehicle are subject to seizure for any other lawful reason.

**History.** Acts 2009, No. 33, § 3.

### **5-62-109. Immunity — Veterinarians.**

(a) A licensed veterinarian or a person acting at the direction of a licensed veterinarian in Arkansas is:

(1) Held harmless from either criminal or civil liability for any decision made or service rendered in conjunction with this subchapter; and

(2) Immune from suit for his or her part in an investigation of cruelty to animals.

(b) A veterinarian or person acting at the direction of a licensed veterinarian who participates or reports in bad faith or with malice is not protected under this subchapter.

**History.** Acts 2009, No. 33, § 3.

### **5-62-110. [Repealed.]**

**Publisher's Notes.** This section, concerning definitions and construction, was repealed by Acts 2009, No. 33, § 4. The section was derived from Acts 1879, No.

47, § 15, p. 54; C. & M. Dig., § 2625; Pope's Dig., § 3312; A.S.A. 1947, § 41-2962.

### **5-62-111. Prevention of cruelty.**

(a) A person may lawfully interfere to prevent the imminent or ongoing perpetration of any offense of cruelty to animals, § 5-62-103, or aggravated cruelty to a dog, cat, or horse, § 5-62-104, upon any animal in his or her presence.

(b) Upon a conviction, a person who knowingly interferes with or obstructs a person acting under subsection (a) of this section is guilty of a Class A misdemeanor.

**History.** Acts 1879, No. 47, § 10, p. 54; A.S.A. 1947, § 41-2957; Acts 2009, No. 33, C. & M. Dig., § 2619; Pope's Dig., § 3306; § 4.

CASE NOTES

**Cited:** Elliott v. Hurst, 307 Ark. 134, 817 S.W.2d 877 (1991).

5-62-112. [Repealed.]

**Publisher’s Notes.** This section, concerning search warrants, was repealed by Acts 2013, No. 1348, § 11. The section was derived from Acts 1879, No. 47, § 14,

p. 54; C. M. Dig., § 2624; Pope’s Dig., § 3311; A.S.A. 1947, § 41-2961; Acts 2009, No. 33, § 4.

5-62-113. [Repealed.]

**Publisher’s Notes.** This section, concerning authority to make arrests, was repealed by Acts 2013, No. 1348, § 12. The section was derived from Acts 1879,

No. 47, § 9, p. 54; C. M. Dig., § 2618; Pope’s Dig., § 3305; A.S.A. 1947, § 41-2956; Acts 2009, No. 33, § 4.

5-62-114, 5-62-115. [Repealed.]

**Publisher’s Notes.** These sections, concerning authority to take charge of animals and vehicles of an arrested person and injunction against a society for the prevention of cruelty to animals, were repealed by Acts 2009, No. 33, § 4. The sections were derived from:

5-62-114. Acts 1879, No. 47, § 12, p. 54; C. & M. Dig., § 2621; Pope’s Dig., § 3308; A.S.A. 1947, § 41-2959.

5-62-115. Acts 1879, No. 47, § 13, p. 54; C. & M. Dig., § 2623; Pope’s Dig., § 3310; A.S.A. 1947, § 41-2960.

5-62-116. Diseased animals — Sale.

(a) Upon conviction, a person who knowingly sells or offers for sale, or uses, or exposes, or causes or procures to be sold or offered for sale, or used, or to be exposed, any horse or other animal having the disease known as “glanders” or “farcy” or any other contagious or infectious disease known to the person to be dangerous to human life, or that is diseased past recovery, is guilty of a Class A misdemeanor.

(b)(1) Upon discovery or knowledge of the animal’s condition, any animal having glanders or farcy shall be humanely killed by the owner or person having charge of the animal, or arrangements shall be made to have the animal euthanized.

(2) Upon conviction, an owner or person having charge of the animal and knowingly omitting or refusing to comply with this section is guilty of a Class A misdemeanor.

**History.** Acts 1879, No. 47, §§ 7, 8, 11, p. 54; C. & M. Dig., §§ 2616, 2617, 2620; Pope’s Dig., §§ 3303, 3304, 3307; A.S.A.

1947, §§ 41-2958, 41-3757, 41-3758; Acts 2009, No. 33, § 4.



## RESEARCH REFERENCES

**Ark. L. Notes.** Looney, The Toothless the Uniform Commercial Code, 1990 Ark. Cow, the Little Bull That Couldn't, and L. Notes 75. Udder Matters: Livestock Warranties and

## CASE NOTES

**Cited:** *Compaignonette v. McArmick*, 91 Ark. 69, 120 S.W. 400 (1909).

**5-62-117. Decompression chambers.**

(a) It is unlawful to use a decompression chamber for the destruction of an animal.

(b) Use of a decompression chamber for the destruction of an animal is a Class C misdemeanor.

**History.** Acts 1979, No. 112, §§ 1, 2; A.S.A. 1947, §§ 41-2958.1, 41-2958.2.

**5-62-118, 5-62-119. [Repealed.]**

**Publisher's Notes.** These sections, concerning impounded animals and food and water, and cruelty in transportation, were repealed by Acts 2009, No. 33, § 5. The sections were derived from: 5-62-118. Acts 1879, No. 47, §§ 3, 4, p. 54; C. & M. Dig., §§ 2612, 2613; Pope's Dig., §§ 3299, 3300; A.S.A. 1947, §§ 41-2953, 41-2954; Acts 2007, No. 827, § 51. 5-62-119. Acts 1879, No. 47, § 5, p. 54; C. & M. Dig., § 2614; Pope's Dig., § 3301; A.S.A. 1947, § 41-2955.

**5-62-120. Unlawful animal fighting.**

(a)(1) A person commits the offense of unlawful animal fighting in the first degree if he or she knowingly:

(A) Promotes, engages in, or is employed at animal fighting;

(B) Receives money for the admission of another person to a place kept for animal fighting; or

(C) Sells, purchases, possesses, or trains an animal for animal fighting.

(2) Unlawful animal fighting in the first degree is a Class D felony.

(b)(1) A person commits the offense of unlawful animal fighting in the second degree if he or she knowingly:

(A) Purchases a ticket of admission to or is present at an animal fight; or

(B) Witnesses an animal fight if it is presented as a public spectacle.

(2) Unlawful animal fighting in the second degree is a Class A misdemeanor.

(c) Upon the arrest of any person for violating a provision of this section, the arresting law enforcement officer or animal control officer may seize and take custody of all animals in the possession of the arrested person.

(d)(1) Upon the conviction of any person for violating a provision of this section, any court of competent jurisdiction may order the forfeiture by the convicted person of all animals the use of which was the basis of the conviction.

(2) Any animal ordered forfeited under a provision of this subsection shall be placed with an appropriate place of custody or an animal control agency.

(e) In addition to the fines, penalties, and forfeitures imposed under this section, the court may require the defendant to make restitution to the state, any of its political subdivisions, or an appropriate place of custody for housing, feeding, or providing medical treatment to an animal used for unlawful animal fighting.

(f) As used in this section, “animal fighting” means fighting between roosters or other birds or between dogs, bears, or other animals.

**History.** Acts 1981, No. 862, § 1; A.S.A. 1947, § 41-2918.1; Acts 1987, No. 26, § 1; 1989, No. 528, § 1; 2009, No. 33, § 6.

### RESEARCH REFERENCES

**ALR.** Validity, Construction, and Application of Criminal Statutes and Ordinances to Prosecution for Dogfighting. 68 A.L.R.6th 115.

Validity, Construction, and Application of Statutes and Ordinances to Prosecution for Cockfighting. 69 A.L.R.6th 207.

### CASE NOTES

#### Evidence.

Where, in prosecution for witnessing a dog fight presented as a public spectacle, a copy of the rules for dog fighting was lawfully seized by the officers as being incidental to the arrests, because it was within the immediate control at least of one witness, and as being evidence of the offense, and the rules were relevant to the action, explaining the purpose of the pit and details shown by the videotape, the copy of the rules was admissible even though the state did not show that the defendants were aware of its existence. *Ash v. State*, 290 Ark. 278, 718 S.W.2d 930 (1986).

The state produced substantial evi-

dence to show the defendant to be guilty of having “promoted” dog fighting, even though she was not present at the dog fight, where the defendant knew that a structure had been built in the back yard for the specific purpose of housing pit bull dogs, with accommodations to contain dogs other than their own, she was familiar with the pit and knew it could be used for dog fighting, she knew that her husband had fought dogs, she realized that numbers of people came to the house from time to time and brought pit bull terriers with them, and she and her children had helped to take care of the dogs, washing them and feeding them. *Ash v. State*, 290 Ark. 278, 718 S.W.2d 930 (1986).

### 5-62-121. Transfer of certain chicks, ducklings, or rabbits.

(a) It is unlawful for any person, firm, or corporation to sell or offer for sale, barter, or give away living baby chicks, rabbits, or ducklings under two (2) months of age in any quantity less than six (6).

(b) It is unlawful for any person, firm, or corporation to sell, offer for sale, barter, give away, or display living baby chicks, rabbits, or

ducklings that have been dyed, colored, or otherwise treated so as to impart to them an artificial color.

(c) This section shall not be construed to prohibit the sale or display of natural baby chicks, rabbits, or ducklings in a proper brooder facility by a hatchery or store engaged in the business of selling them for commercial purposes.

(d) Any person, firm, or corporation violating any provision of this section upon conviction is deemed guilty of a Class C misdemeanor.

(e) Nothing in this section prohibits a grower of living baby chicks, rabbits, ducklings, or other fowl from selling or making gifts of them in quantities the grower deems appropriate.

**History.** Acts 1977, No. 792, § 1; A.S.A. 1947, § 41-4101.

### 5-62-122. Permitting livestock to run at large.

(a) A person commits the offense of permitting livestock to run at large if being the owner or person charged with the custody and care of livestock he or she knowingly permits the livestock to run at large.

(b)(1) Except as provided in subdivision (b)(2) of this section, permitting livestock to run at large is a violation and upon conviction a person may be subject to a fine not to exceed one hundred dollars (\$100).

(2) Any person who knowingly allows any hog to run at large is guilty of a violation and upon conviction is subject to a fine not to exceed five hundred dollars (\$500).

**History.** Acts 1975, No. 280, § 2919; 457, § 4; 2005, No. 1994, § 183; 2009, No. A.S.A. 1947, § 41-2919; Acts 1999, No. 33, § 7.

## CASE NOTES

### ANALYSIS

Civil Liability.  
Owner.

#### Civil Liability.

For cases discussing civil liability, see *Poole v. Gillison*, 15 F.R.D. 194 (E.D. Ark. 1953); *Rogers v. Stillman*, 223 Ark. 779, 268 S.W.2d 614 (1954); *Oliver v. Jones*, 239 Ark. 572, 393 S.W.2d 248 (1965); *Prickett v. Farrell*, 248 Ark. 996, 455 S.W.2d 74 (1970) (preceding decisions under prior law).

#### Owner.

Person who kept pony on his premises, fed it, and paid to have it shod exercised sufficient control over the pony to be considered the owner of the pony. *Prickett v. Farrell*, 248 Ark. 996, 455 S.W.2d 74 (1970) (decision under prior law).

**Cited:** *Cosby v. Oliver*, 265 Ark. 156, 577 S.W.2d 399 (1979); *Sanders v. Mincey*, 317 Ark. 398, 879 S.W.2d 398 (1994).

### 5-62-123. [Repealed.]

**Publisher's Notes.** This section, concerning larceny of animals including carcasses and flesh, was repealed by Acts

2013, No. 1348, § 13. The section was derived from *Init. Meas.* 1936, No. 3, § 21, *Acts* 1937, p. 1384; *Pope's Dig.*, § 3850;



A.S.A. 1947, § 43-2156.

### **5-62-124. Unlawful bear exploitation.**

(a) A person commits the offense of unlawful bear exploitation if he or she knowingly:

- (1) Promotes, engages in, or is employed at a bear wrestling match;
- (2) Receives money for the admission of another person to a place kept for bear wrestling;
- (3) Sells, purchases, possesses, or trains a bear for bear wrestling; or
- (4) For purposes of exploitation, subjects a bear to surgical alteration in any form, including, but not limited to, declawing, tooth removal, and severing tendons.

(b) Unlawful bear exploitation is a Class D felony.

(c) Upon the arrest of any person for violating a provision of this section, the arresting law enforcement officer or animal control officer may seize and take custody of any bear in the possession of the arrested person.

(d)(1) Upon the conviction of any person for violating a provision of this section, any court of competent jurisdiction may order the forfeiture by the convicted person of any bear the use of which was the basis of the conviction.

(2) Any bear ordered forfeited under a provision of this section shall be placed in the custody of a society which is incorporated for the prevention of cruelty to animals.

(e) In addition to the fines, penalties, and forfeitures imposed under a provision of this section, the court may require the defendant to make restitution to the state, any of its political subdivisions, or a society which is incorporated for the prevention of cruelty to animals for housing, feeding, or providing medical treatment to a bear used for unlawful wrestling.

**History.** Acts 1989, No. 346, § 1.

### **5-62-125. Unlawful dog attack.**

(a) A person commits the offense of unlawful dog attack if:

(1) The person owns a dog that the person knows or has reason to know has a propensity to attack, cause injury, or endanger the safety of other persons without provocation;

(2) The person negligently allows the dog to attack another person; and

(3) The attack causes the death of or serious physical injury to the person attacked.

(b) The offense of unlawful dog attack is a Class A misdemeanor.

(c) In addition to any penalty imposed under this section, the court or jury may require the defendant to pay restitution under § 5-4-205 for any medical bills of the person attacked for injuries caused by the attack.

**History.** Acts 2007, No. 258, § 1.

### **5-62-126. Acts of God — Emergency conditions.**

An owner of an animal or person in control of an animal is not guilty of either the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, if the owner of the animal or the person in control of the animal was reasonably precluded as the result of an act of God or emergency conditions from engaging in an act or omission that might prevent an allegation of the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104.

**History.** Acts 2009, No. 33, § 8.

### **5-62-127. Removal of an animal's transmittal device.**

(a) A person commits removal of an animal's transmittal device if he or she knowingly:

(1) Removes a transmittal device from a dog used in hunting or a raptor used in falconry without permission of the owner; and

(2) Removes the transmittal device with the purpose to prevent or hinder the owner from locating the dog used in hunting or raptor used in falconry.

(b) Removal of an animal's transmittal device is a Class C misdemeanor.

(c)(1) Upon a finding of guilt, the court shall order that the defendant pay as restitution the actual value of any dog used in hunting or raptor used in falconry lost or killed as a result of the removal of the animal's transmittal device.

(2) The court also may order restitution to the owner for any lost breeding revenues.

**History.** Acts 2013, No. 1094, § 1; substituted "Removes the transmittal device with" for "With" in (a)(2).  
2015, No. 1155, § 10.

**Amendments.** The 2015 amendment

## **SUBCHAPTER 2 — FARM ANIMAL AND RESEARCH FACILITIES**

#### **SECTION.**

5-62-201. Findings of the General Assembly.

5-62-202. Definitions.

#### **SECTION.**

5-62-203. Offenses.

5-62-204. [Repealed.]

### **5-62-201. Findings of the General Assembly.**

(a) The General Assembly finds that:

(1) The caring, rearing, feeding, breeding, and sale of animals and animal products and the use of animals in research, testing, and education represent vital segments of the economy of the state;

(2) Producers and others involved in the production and sale of animals and animal products and the use of animals in research and

education have a vested interest in protecting the health and welfare of animals and the physical and intellectual property rights which they have in animals; and

(3) There has been an increasing number of illegal acts committed against farm animal and research facilities.

(b) The General Assembly further finds that these illegal acts threaten the production of agricultural products and jeopardize crucial scientific, biomedical, or agricultural research.

(c) Finally, the General Assembly finds that these illegal acts threaten the public safety, by exposing communities to contagious diseases and damage research.

**History.** Acts 1991, No. 1006, § 2.

### **5-62-202. Definitions.**

As used in this subchapter:

(1) “Animal” means any warm or cold-blooded animal used in food or fiber production, agriculture, research, testing, or education, including poultry, fish, and insects;

(2) “Animal facility” means any vehicle, building, structure, or premises, where an animal or animal records are kept, handled, housed, exhibited, bred, or offered for sale;

(3) “Consent” means assent in fact, whether express or apparent;

(4) “Deprive” means to:

(A) Withhold an animal or other property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the animal or property is lost to the owner;

(B) Restore an animal or other property only upon payment of reward or other compensation; or

(C) Dispose of an animal or other property in a manner that makes recovery of the animal or property by the owner unlikely;

(5) “Effective consent” means consent by a person legally authorized to act for the owner. Consent is not effective:

(A) If induced by force, threat, false pretense, or fraud;

(B) If given by a person the actor knows is not legally authorized to act for the owner;

(C) If given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the actor to be unable to make reasonable decisions; or

(D) If given solely to detect the commission of an offense;

(6) “Notice” means:

(A) Oral or written communication by the owner or a person with apparent authority to act for the owner;

(B) Fencing or other enclosure obviously designed to exclude persons or to contain animals; or

(C) A sign or signs posted on property or at the entrance to a building, reasonably likely to come to the attention of a person, indicating that entry is forbidden;



(7) “Owner” means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor;

(8) “Person” means any individual, corporation, association, non-profit corporation, joint stock company, firm, trust, partnership, two (2) or more persons having a joint or common interest, or other legal entity; and

(9) “Possession” means actual care, custody, control, or management.

**History.** Acts 1991, No. 1006, § 1; inserted present (6), and redesignated the 2015, No. 1263, § 14. remaining subdivisions accordingly.

**Amendments.** The 2015 amendment

### 5-62-203. Offenses.

(a)(1) A person commits an offense if, without the effective consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility, with the purpose to:

(A) Deprive the owner of the animal facility, animal, or property; and

(B) Disrupt or damage the enterprise conducted at the animal facility.

(2) A person commits an offense if, without the effective consent of the owner and with the purpose to disrupt or damage the enterprise conducted at the animal facility, the person damages or destroys:

(A) An animal facility; or

(B) Any animal or property in or on an animal facility.

(3) A person commits an offense if, without the effective consent of the owner and with the purpose to disrupt or damage the enterprise conducted at the animal facility, the person:

(A) Enters an animal facility, not then open to the public, with the purpose to commit an act prohibited by this section;

(B) Remains concealed, with the purpose to commit an act prohibited by this section, in an animal facility; or

(C) Enters an animal facility and commits or attempts to commit an act prohibited by this section.

(4) A person commits an offense if, without the effective consent of the owner and with the purpose to disrupt or damage the enterprise conducted at the animal facility, the person:

(A) Enters or remains in an animal facility; and

(B) Had notice that the entry was forbidden or received notice to depart but failed to depart.

(b) A person who violates this section upon conviction is guilty of a Class D felony.

(c) A person convicted of violating this section shall be ordered to make restitution to the animal facility in the full amount of the reasonable cost of:

(1) Replacing materials, data, equipment, or animals, and records that may have been damaged or cannot be returned; and

(2) Repeating any experimentation that may have been interrupted or invalidated as a result of the violation.

(d) This subchapter does not affect any other right of a person that has been damaged by reason of a violation of this subchapter.

**History.** Acts 1991, No. 1006, § 3; 2015, No. 1263, § 15.

**Amendments.** The 2015 amendment substituted “purpose” for “intent” throughout the section; redesignated former (a) through (d)(1) as (a)(1) through (a)(4); deleted former (d)(2); and added present (b) through (d).

5-62-204. [Repealed.]

**Publisher’s Notes.** This section, concerning penalties, was repealed by Acts 2015, No. 1263, § 16. This section was derived from Acts 1991, No. 1006, § 4.

CHAPTER 63

BUSINESS MISCONDUCT

- SUBCHAPTER.
- 1. GENERAL PROVISIONS. [RESERVED.]
  - 2. OFFENSES GENERALLY.
  - 3. DEBT ADJUSTING.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved.]

SUBCHAPTER 2 — OFFENSES GENERALLY

- |  |   |
|--|---|
| SECTION.   | SECTION.                                    |
| 5-63-201. Tickets to certain events — Sale in excess of regular price. | insurance policy for another.               |
| 5-63-202. Requiring borrower to pay contribution to substitute one     | 5-63-203. [Repealed.]                       |
|  | 5-63-204. Automated telephone solicitation. |

**Effective Dates.** Acts 1981, No. 947, § 5: became law without Governor’s signature, Apr. 8, 1981. Emergency clause provided: “It is hereby found and determined by the General Assembly that a number of individuals and firms are using public telephone systems for the making of automated telephone solicitations which invade the privacy of individuals, and imposes unsolicited and undue burdens upon thousands of individuals in this

State and that immediate passage of this Act is necessary to prohibit said automated telephone solicitation and imposing a penalty for violation thereof. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

### 5-63-201. Tickets to certain events — Sale in excess of regular price.

(a)(1) It is unlawful for any person, corporation, firm, or partnership to resell or offer for resale a ticket to an event for a price higher than the greater of either:

(A) The price originally charged for the ticket by the venue or entity hosting the event or the venue or entity's authorized agent plus a reasonable charge for handling or credit card use; or

(B) The price printed on the ticket.

(2) This subsection does not apply to an institution of higher education that receives funds per ticket above the face value of the ticket.

(b)(1) Any person, corporation, firm, or partnership violating any provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500).

(2) Every sale or offer for sale is a separate offense.

(c) As used in this section, "event" means a live entertainment event, athletic event, sporting event, theater performance, musical performance, or an event held for the benefit of charity.

**History.** Acts 1955, No. 51, §§ 1, 2; A.S.A. 1947, §§ 41-4151, 41-4152; Acts 1987, No. 21, § 1; 1993, No. 565, § 1; 2005, No. 1994, § 53; 2015, No. 860, § 2.

**Amendments.** The 2015 amendment substituted "certain events" for "school athletic events or music entertainment events" in the section heading; rewrote (a)(1); substituted "does not apply" for "shall not apply" in (a)(2); and added (c).

### RESEARCH REFERENCES

**Ark. L. Rev.** Scalping Tickets to Athletic Events, 9 Ark. L. Rev. 399.

### CASE NOTES

#### In General.

This section applies to an exclusive agent who sells tickets that include in the price of the ticket additional fees, and the plain and ordinary meaning of "box office" is a booth, as in a theater or stadium, where tickets are sold. It is applicable to exclusive agents of a public facility who sell music entertainment tickets that in-

clude in the price of the ticket additional fees, resulting in the price of the ticket being more than the face value and advertised price of the ticket, unless those fees are a reasonable charge for handling or credit card use. *McMillan v. Live Nation Entm't, Inc.*, 2012 Ark. 166, 401 S.W.3d 473 (2012) (decided under former version of statute).

### 5-63-202. Requiring borrower to pay contribution to substitute one insurance policy for another.

(a) No person, firm, or corporation engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property and no trustee, director, officer, agent, or other employee of any person, firm, or corporation engaged in the business of financing the purchase of real or personal



property or of lending money on the security of real or personal property shall directly or indirectly require that a borrower pay a consideration of any kind to substitute the insurance policy of one (1) insurer for that of another insurer.

(b) Any violation of a provision of this section constitutes a violation, and upon conviction the violator shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each offense.

**History.** Acts 1957, No. 229, §§ 1, 2; A.S.A. 1947, §§ 41-4153, 41-4154; Acts 2005, No. 1994, § 53.

### 5-63-203. [Repealed.]

**Publisher's Notes.** This section, concerning records of bicycle sales, was repealed by Acts 2005, No. 1994, § 545. The section was derived from Acts 1957, No. 334, §§ 1, 2; A.S.A. 1947, §§ 41-4155, 41-4156.

### 5-63-204. Automated telephone solicitation.

(a)(1) It is unlawful for any person to use a telephone for the purpose of offering any goods or services for sale, or for conveying information regarding any goods or services for the purpose of soliciting the sale or purchase of the goods or services, or for soliciting information, gathering data, or for any other purpose in connection with a political campaign when the use involves an automated system for the selection and dialing of telephone numbers and the playing of recorded messages when a message is completed to the called number.

(2) However, nothing in this section prohibits the use of:

(A) A telephone involving an automated system for the selection and dialing of telephone numbers and the play of recorded messages to:

(i) Inform the purchaser of the goods or services concerning receipt and availability of the goods or services for delivery to the purchaser; or

(ii) Convey information concerning any delay or pertinent information about the current status of any purchase order previously made; or

(B) An automated telephone system with a recorded message when the call is made or message given solely in response to a call initiated by the person to which the automatic call or recorded message is directed.

(b) Any person who violates any provision of this section upon conviction is guilty of a Class B misdemeanor and shall be punished accordingly.

(c)(1) The Attorney General, a prosecuting attorney, any law enforcement officer, or any telephone company serving an area from which automated telephone calls are made may seek injunctive relief to enforce the provision of this section.

(2) If a civil action is filed pursuant to this section, the prevailing party is entitled to a reasonable attorney's fee and court costs.

**History.** Acts 1981, No. 947, §§ 1-3;  
A.S.A. 1947, §§ 41-4162 — 41-4164.

### CASE NOTES

**Cited:** Potomac Leasing Co. v. Vitality  
Ctrs., Inc., 290 Ark. 265, 718 S.W.2d 928  
(1986).

## SUBCHAPTER 3 — DEBT ADJUSTING

### SECTION.

5-63-301. Definitions.

5-63-302. Debt adjusting — Prohibition.

5-63-303. Debt adjusting — Injunction  
against operation — Re-  
ceivership.

### SECTION.

5-63-304. [Repealed.]

5-63-305. Debt adjusting law — Exclu-  
sions.

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**Effective Dates.** Acts 1983, No. 189,  
§ 4: Feb. 15, 1983. Emergency clause pro-  
vided: "It is hereby found and determined  
by the General Assembly that nonprofit  
organizations giving debt management  
service for a fee not to exceed the amount  
of expenses incurred in giving such ser-  
vice should not be considered debt adjust-

ers for purposes of Act 61 of 1967, and that  
this Act is immediately necessary to grant  
such exemption. Therefore, an emergency  
is hereby declared to exist and this Act  
being immediately necessary for the pres-  
ervation of the public peace, health and  
safety shall be in full force and effect from  
and after its passage and approval."

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### 5-63-301. Definitions.

As used in this subchapter:

(1) "Debt adjuster" means a person who engages in, attempts to engage in, or offers to engage in the practice or business of debt adjusting;

(2) "Debt adjusting" means the:

(A) Entering into or making of a contract, express or implied, with a particular debtor in which the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business that, for a consideration, agrees to distribute, or distributes, the money among certain specified creditors in accordance with an agreed upon plan; or

(B) Business or practice of any person that holds oneself out as acting or offering or attempting to act for a consideration as an intermediary between a debtor and the debtor's creditors for the purpose of settling, compounding, or in anyway altering the terms of payment of any debt of a debtor and, to that end, receives money or

other property from the debtor or on behalf of the debtor for the payment to or distribution among the creditors of the debtor;

(3) “Debtor” means an individual and includes two (2) or more individuals who are jointly and severally, or jointly or severally, indebted to a creditor; and

(4) “Person” includes an individual, partnership, association, and corporation.

**History.** Acts 1967, No. 61, § 1; A.S.A. 1947, § 41-4157.

**5-63-302. Debt adjusting — Prohibition.**

(a) A person shall not engage in, or offer to or attempt to engage in, the business or practice of debt adjusting in this state.

(b) A violation of subsection (a) of this section is a Class A misdemeanor.

**History.** Acts 1967, No. 61, § 2; A.S.A. 1947, § 41-4158; Acts 2015, No. 1263, § 17. designated the existing language as (a); substituted “A person shall not” for “No person shall”; and added (b).

**Amendments.** The 2015 amendment

**5-63-303. Debt adjusting — Injunction against operation — Receivership.**

(a) In an action brought in the name of the state by a prosecuting attorney within his or her district or by the Attorney General, a circuit court has jurisdiction to enjoin any person from:

(1) Acting, offering to act, or attempting to act as a debt adjuster; or

(2) Engaging in the business of debt adjusting.

(b) In an action under subsection (a) of this section, the circuit court may appoint a receiver for the property and money employed in the transaction of business by the person as a debt adjuster, to ensure, so far as may be possible, the return to debtors of so much of their money and property as has been received by the debt adjuster and has not been paid to the creditors of the debtors.

**History.** Acts 1967, No. 61, § 3; A.S.A. 1947, § 41-4159.

**5-63-304. [Repealed.]**

**Publisher’s Note.** This section, concerning penalties for acting as debt adjuster, was repealed by Acts 2015, No. 1263, § 18. The section was derived from Acts 1967, No. 61, § 4; A.S.A. 1947, § 41-4160; Acts 2005, No. 1994, § 223.

**5-63-305. Debt adjusting law — Exclusions.**

The following persons are not considered a debt adjuster for the purposes of this subchapter:

(1) An attorney at law;



(2) A bank, fiduciary, or financing and lending institution as authorized and admitted to transact business in this state and performing credit and financial adjusting services in the regular course of its principal business;

(3) A title insurer or abstract company, while doing an escrow business;

(4) An employer, for its employees;

(5) A judicial officer or another person acting pursuant to court order;

(6) A nonprofit organization giving debt management service without fee or charge or with a fee if the fee is in an amount not to exceed the amount of actual expenses incurred in offering the debt management service; and

(7) An association, for its members.

**History.** Acts 1967, No. 61, § 5; 1983, No. 189, § 2; A.S.A. 1947, § 41-4161.

## CHAPTER 64

### CONTROLLED SUBSTANCES

#### SUBCHAPTER.

1. UNIFORM CONTROLLED SUBSTANCES ACT — DEFINITIONS.
2. UNIFORM CONTROLLED SUBSTANCES ACT — DESIGNATION OF CONTROLLED SUBSTANCES.
3. UNIFORM CONTROLLED SUBSTANCES ACT — REGULATION OF DISTRIBUTION.
4. UNIFORM CONTROLLED SUBSTANCES ACT — PROHIBITIONS AND PENALTIES.
5. UNIFORM CONTROLLED SUBSTANCES ACT — ENFORCEMENT AND ADMINISTRATION.
6. UNIFORM CONTROLLED SUBSTANCES ACT — MISCELLANEOUS. [REPEALED.]
7. PROVISIONS RELATING TO THE UNIFORM CONTROLLED SUBSTANCES ACT.
8. SALE OF DRUG DEVICES.
9. CIVIL ACTIONS AGAINST SELLERS OF DRUG PARAPHERNALIA.
10. RECORDS OF TRANSACTIONS.
11. EPHEDRINE AND OTHER NONPRESCRIPTION DRUGS.
12. NITROUS OXIDE.
13. ANHYDROUS AMMONIA.

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**A.C.R.C. Notes.** Though Arkansas adopted the major provisions of the Uniform Controlled Substances Act of 1970 by Acts 1971, No. 590, which is codified in this chapter, subsequent nonuniform amendments to this chapter have caused this chapter to substantially depart from the official text of the uniform act. As a result, the entire chapter, including sections based on the uniform act, has been conformed to the style of the Arkansas Code.

**Cross References.** Administering

controlled substance to another, § 5-13-210.

Arkansas Drug Abuse Control Act, § 20-64-301 et seq.

Immunity of teachers reporting drug abuse, § 6-17-107.

Institutionalizing of persons addicted to alcohol or drugs, § 20-64-801 et seq.

Uniform Narcotic Drug Act, § 20-64-201 et seq.

Videotaped depositions of State Crime Laboratory analysts, § 16-43-215.

RESEARCH REFERENCES

**ALR.** State and local administrative inspection of and administrative warrants to search pharmacies. 29 A.L.R.4th 264.

Validity of Warrantless Search of Motor Vehicle Based on Odor of Marijuana — State Cases. 114 A.L.R.5th 173.

Validity of Warrantless Search Based in Whole or in Part on Odor of Narcotics

other than Marijuana. 115 A.L.R.5th 477.

Validity of Warrantless Search of Motor Vehicle Driver Based on Odor of Marijuana — State Cases. 123 A.L.R.5th 179.

**Am. Jur.** 25 Am. Jur. 2d, Drugs, § 10 et seq., § 141 et seq.

**C.J.S.** 28 C.J.S. Supp., Drugs, § 210 et seq.

CASE NOTES

**Cited:** *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993).

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SUBCHAPTER 1 — UNIFORM CONTROLLED SUBSTANCES ACT — DEFINITIONS

SECTION.

5-64-101. Definitions.

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**Publisher's Notes.** For Comments regarding the Uniform Controlled Substances Act, see Commentaries Volume B.

**Effective Dates.** Acts 1975, No. 305, § 4: Mar. 3, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971 upon the possession of marijuana and the penalty therefor; that the problem of drug abuse in this state is increasing at an alarming rate and that additional provisions are needed to assist in enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 78, § 7: became law without Governor's signature, Feb. 15, 1981. Emergency clause provided: "It is hereby found and determined by the Gen-

eral Assembly that there is an increasing problem of drug abuse in the State of Arkansas and that in order to protect the public health and safety immediate steps must be taken to enact a comprehensive Drug Paraphernalia Act and the immediate passage of this Act is necessary to accomplish this purpose; therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force from and after its passage and approval."

Acts 1983, No. 787, § 10: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an increasing problem of counterfeit substances in the State of Arkansas and that in order to protect the public health and safety, immediate steps must be taken to establish a system of punishment for those possessing or distributing such substances. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval."

**RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Survey —  
Criminal Law, 10 U. Ark. Little Rock L.J.  
559.

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**5-64-101. Definitions.**

As used in this chapter:

(1) “Administer” means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by:

(A) A practitioner; or

(B) The patient or research subject at the direction and in the presence of the practitioner;

(2)(A) “Agent” means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser.

(B) “Agent” does not include a common or contract carrier, public warehouseman, or employee of the common or contract carrier or warehouseman;

(3)(A) “Anabolic steroid” means any drug or hormonal substance, chemically and pharmacologically related to testosterone, other than estrogens, progestin, and corticosteroid that promotes muscle growth.

(B)(i) “Anabolic steroid” does not include an anabolic steroid that is expressly intended for administration through an implant to cattle or another nonhuman species and that has been approved by the Director of the Department of Health for such administration.

(ii) If any person prescribes, dispenses, or distributes a steroid described in subdivision (3)(B)(i) of this section for human use, the person is considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of this subdivision (3);

(4) “Controlled substance” means a drug, substance, or immediate precursor in Schedules I through VI;

(5)(A) “Counterfeit substance” means a noncontrolled substance, that by overall dosage unit appearance including color, shape, size, markings, packaging, labeling, and overall appearance or upon the basis of representations made to the recipient, purports to be a controlled substance or to have the physical or psychological effect associated with a controlled substance.

(B) In determining whether a substance is a “counterfeit substance”, the following factors shall be utilized and a finding of any two (2) of these factors constitutes prima facie evidence that the substance is a “counterfeit substance”:

(i) A statement made by an owner or by anyone else in control of the substance concerning the nature of the substance, its use, or effect;



(ii) The physical appearance of the finished product containing the noncontrolled substance is substantially the same as that of a specific controlled substance;

(iii) The noncontrolled substance is unpackaged or is packaged in a manner normally used for the illegal delivery of a controlled substance;

(iv) The noncontrolled substance is not labeled in accordance with 21 U.S.C. § 352 or 21 U.S.C. § 353;

(v) The person delivering, attempting to deliver, or causing delivery of the noncontrolled substance states or represents to the recipient that the noncontrolled substance may be resold at a price that substantially exceeds the value of the substance;

(vi) An evasive tactic or action utilized by the owner or person in control of the substance to avoid detection by a law enforcement authority; or

(vii) A prior conviction, if any, of an owner, or anyone in control of the object under a state or federal law related to a controlled substance or fraud;

(6) “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship;

(7) “Dispense” means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the controlled substance for that delivery;

(8) “Dispenser” means a practitioner who dispenses;

(9) “Distribute” means to deliver other than by administering or dispensing a controlled substance;

(10) “Distributor” means a person who distributes;

(11)(A) “Drug” means a substance:

(i) Recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them;

(ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(iii) Other than food intended to affect the structure or any function of the body of humans or animals; and

(iv) Intended for use as a component of any article specified in subdivision (11)(A)(i), subdivision (11)(A)(ii), or subdivision (11)(A)(iii) of this section.

(B) “Drug” does not include a device or its components, parts, or accessories;

(12)(A) “Drug paraphernalia” means any equipment, product, and material of any kind that are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, prepar-

ing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.

(B) "Drug paraphernalia" includes, but is not limited to:

(i) A kit used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting any species of plant that is a controlled substance or from which a controlled substance can be derived;

(ii) A kit used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance;

(iii) An isomerization device used, intended for use, or designed for use in increasing the potency of any species of plant that is a controlled substance;

(iv) Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of a controlled substance;

(v) A scale or balance used, intended for use, or designed for use in weighing or measuring a controlled substance;

(vi) A diluent or adulterant, such as quinine hydrochloride, manitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting a controlled substance;

(vii) A separation gin or sifter used, intended for use, or designed for use in removing a twig or seed from, or in otherwise cleaning or refining, marijuana;

(viii) A blender, bowl, container, spoon, or mixing device used, intended for use, or designed for use in compounding a controlled substance;

(ix) A capsule, balloon, envelope, or other container used, intended for use, or designed for use in packaging a small quantity of a controlled substance;

(x) A container or other object used, intended for use, or designed for use in storing or concealing a controlled substance;

(xi) A hypodermic syringe, needle, or other object used, intended for use, or designed for use in parenterally injecting a controlled substance into the human body; and

(xii) An object used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing a controlled substance into the human body, such as:

(a) A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;

(b) A water pipe;

(c) A carburetion tube or device;

(d) A smoking or carburetion mask;

(e) A roach clip, meaning an object used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand;

- (f) A miniature cocaine spoon or cocaine vial;
- (g) A chamber pipe;
- (h) A carburetor pipe;
- (i) An electric pipe;
- (j) An air-driven pipe;
- (k) A chillum;
- (l) A bong;
- (m) An ice pipe or chiller; and
- (n) An aluminum foil boat.

(C) In determining whether an object is “drug paraphernalia”, a court or other authority shall consider, in addition to any other logically relevant factor, the following:

(i) A statement by an owner or by anyone in control of the object concerning its use;

(ii) A prior conviction, if any, of an owner or of anyone in control of the object under any state or federal law relating to any controlled substance;

(iii) The proximity of the object in time and space to a direct violation of this chapter;

(iv) The proximity of the object to a controlled substance;

(v) The existence of any residue of a controlled substance on the object;

(vi)(a) Direct or circumstantial evidence of the intent of an owner or of anyone in control of the object to deliver it to a person whom he or she knows, or should reasonably know, intends to use the object to facilitate a violation of this chapter.

(b) The innocence of an owner or of anyone in control of the object as to a direct violation of this chapter does not prevent a finding that the object is intended for use or designed for use as “drug paraphernalia”;

(vii) An oral or written instruction provided with the object concerning its use;

(viii) Descriptive materials accompanying the object that explain or depict its use;

(ix) National and local advertising concerning the object’s use;

(x) The manner in which the object is displayed for sale;

(xi) Whether the owner or anyone in control of the object is a legitimate supplier of a like or related item to the community, such as a licensed distributor or dealer of a tobacco product;

(xii) Direct or circumstantial evidence of the ratio of sales of the objects to the total sales of the business enterprise;

(xiii) The existence and scope of legitimate uses for the object in the community; and

(xiv) Expert testimony concerning the object’s use;

(13) “Immediate precursor” means a substance that the director has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and that is an immediate chemical intermediary used or likely to be used in the manufacture of



a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture;

(14)(A) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from a substance of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

(B) "Manufacture" includes any packaging or repackaging of a controlled substance or labeling or relabeling of a controlled substance's container.

(C) However, "manufacture" does not include the preparation or compounding of a controlled substance by an individual for his or her own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(i) By a practitioner as an incident to his or her administering or dispensing of a controlled substance in the course of his or her professional practice; or

(ii) By a practitioner or by his or her authorized agent under his or her supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale;

(15)(A) "Marijuana" means:

(i) Any part and any variety or species, or both, of the Cannabis plant that contains THC (Tetrahydrocannabinol) whether growing or not;

(ii) The seeds of the plant;

(iii) The resin extracted from any part of the plant; and

(iv) Every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.

(B) "Marijuana" does not include:

(i) The mature stalks of the plant;

(ii) Fiber produced from the stalks;

(iii) Oil or cake made from the seeds of the plant;

(iv) Any other compound, manufacture, salt, derivative, mixture, or preparation of the:

(a) Mature stalks, except the resin extracted from the mature stalks;

(b) Fiber;

(c) Oil; or

(d) Cake; or

(v) The sterilized seed of the plant that is incapable of germination;

(16)(A)(i) "Narcotic drug" means any drug that is defined as a narcotic drug by order of the director.

(ii) In the formulation of a definition of "narcotic drug", the director shall:

(a) Include any drug that he or she finds is narcotic in character and by reason of being narcotic is dangerous to the public health or is promotive of addiction-forming or addiction-sustaining results upon

the user that threaten harm to the public health, safety, or morals; and

(b) Take into consideration the provisions of the federal narcotic laws as they exist from time to time and shall amend the definitions so as to keep them in harmony with the definitions prescribed by the federal narcotic laws, so far as is possible under the standards established in this subdivision (16) and under the policy of this chapter.

(B) "Narcotic drug" also means any of the following, whether produced directly or indirectly by extraction from a substance of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i)(a) Opium, opiates, a derivative of opium or opiates, including their isomers, esters, and ethers whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation.

(b) "Narcotic drug" does not include an isoquinoline alkaloid of opium;

(ii) Poppy straw and concentrate of poppy straw;

(iii) Coca leaves, except coca leaves and extracts of coca leaves from which cocaines, ecgonine, and derivatives of ecgonine or their salts have been removed;

(iv) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(v) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(vi) Any compound, mixture, or preparation that contains any quantity of any substance referred to in subdivisions (16)(B)(i)-(v) of this section;

(17) "Noncontrolled substance" means any liquid, substance, or material not listed in Schedules I through VI of the Schedules of Controlled Substances promulgated by the director;

(18) "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity;

(19) "Practitioner" means:

(A) A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state; and

(B) A pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state;

(20) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance;

(21) "State" when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession thereof, and

any area subject to the legal authority of the United States of America; and

(22) "Ultimate user" means a person who lawfully possesses a controlled substance for:

(A) The person's own use;

(B) The use of a member of the person's household; or

(C) Administering to an animal owned by the person or by a member of his or her household.

**History.** Acts 1971, No. 590, Art. 1, § 1; A.S.A. 1947, § 82-2601; Acts 1987, No. 42, 1975, No. 243, § 1; 1975, No. 305, § 1; § 2; 1991, No. 570, § 1; 1995, No. 1296, 1979, No. 898, §§ 1, 2; 1981, No. 78, § 1; § 7; 2005, No. 1994, § 301; 2007, No. 199, 1981, No. 116, § 1; 1983, No. 787, §§ 1, 2; § 1; 2007, No. 827, §§ 52-55.

### RESEARCH REFERENCES

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

**U. Ark. Little Rock L.J.** Legislative Survey, Criminal Law, 4 U. Ark. Little Rock L.J. 583.

Legislation of the 1983 General Assembly, Criminal Law, 6 U. Ark. Little Rock L.J. 613.

Legislative Survey, Criminal Law, 8 U. Ark. Little Rock L.J. 559.

### CASE NOTES

#### ANALYSIS

Constitutionality.

Controlled Substance.

Deliver or Delivery.

Drug Paraphernalia.

Evidence.

Manufacture and Production.

Marijuana.

Narcotic Drug.

#### Constitutionality.

Although the defendant offered testimony that marijuana was not as harmful as alcohol or tobacco, the evidence presented by the defendant was not so overwhelming and uncontradicted as to convince the court that the Controlled Substances Act was arbitrary, capricious and unreasonable and, therefore, violated the due process clause and the equal protection clause of the United States Constitution. *Bushong v. State*, 267 Ark. 113, 589 S.W.2d 559 (1979), cert. denied, 446 U.S. 938, 100 S. Ct. 2157, 64 L. Ed. 2d 791 (1980).

Former subsection (y) of this section (see now subdivision (12)) and former § 5-64-403(c)(1) (see now § 5-64-443) concerning the term "drug paraphernalia" are not unconstitutionally vague for want of "certainty" or "definiteness," since they give a

person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988).

The drug paraphernalia law is not unconstitutionally vague, because the detailed definitions found in the statute give adequate notice of conduct constituting the offense. *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992).

#### Controlled Substance.

When doubts as to construction of use of term "controlled substance" in definition section was considered in light of strict construction, possession of drugs classified in schedule of act to provide separate classifications for marijuana and another substance did not constitute a misdemeanor. *White v. State*, 260 Ark. 361, 538 S.W.2d 550 (1976).

Cocaine is a Schedule II controlled substance. *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986).

Evidence was sufficient to support defendant's conviction for possession of methamphetamine with intent to deliver where defendant had control over the 16 grams of methamphetamine, he stated that he had already sold some before arriving at the motel, and defendant offered to sell the remainder to an undercover



police officer. *Dodson v. State*, 358 Ark. 372, 191 S.W.3d 511 (2004).

### **Deliver or Delivery.**

Defendant who testified that the sale of drugs was actually between the officer and a third person, although he did get the drugs and give them to the officer and took the money for the drugs and gave it to the third person, was properly convicted for violating Controlled Substances Act. *Snelling v. State*, 257 Ark. 602, 519 S.W.2d 52 (1975).

Under the definition of deliver or delivery it makes no difference, on a motion for directed verdict, whether the transferor acts as an agent for the purchaser or the seller. *Curry v. State*, 258 Ark. 528, 527 S.W.2d 902 (1975).

Person who drove parties to address where sale of controlled substance was made could not defend on ground that he was a mere bystander where there was substantial evidence to show that he not only stood by, but aided, abetted and assisted in the delivery. *Fant v. State*, 258 Ark. 1015, 530 S.W.2d 364 (1975).

Where the defendant simply introduced the undercover officers to the sellers of controlled substance from whom the officers bought some controlled substance, the defendant was not guilty of delivering controlled substance since he would have had to take a more active part to be a principal or even an accomplice. *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980).

The exchange of something of value is not essential to the offense of delivery of a controlled substance. *Anderson v. State*, 275 Ark. 298, 630 S.W.2d 23 (1982).

The requirement that delivery be "in exchange for money or anything of value" was intended to make the comparatively severe penalty for delivery inapplicable to a gratuitous transfer, such as the action of two or more persons in smoking one marijuana cigarette by passing it around; the legislature, however, left intact the Uniform Act's provision that a delivery includes an attempted transfer and, accordingly, where the jury could find from substantial evidence that defendant attempted to transfer controlled substance in exchange for an agreed sum of money and had completed his part of the transaction, the proof was sufficient to support conviction even though the exchange of

money was not completed. *Anderson v. State*, 275 Ark. 298, 630 S.W.2d 23 (1982).

Subdivision (f) of this section (see now subdivision (6)) only requires the attempted transfer of drugs in exchange for an agreed price; the exchange of drugs for money or anything of value is not essential to the commission of the offense. *Marshall v. State*, 289 Ark. 462, 712 S.W.2d 894 (1986).

Definition of "sale" is included in the definition of "deliver" as both involve a transfer of an item in exchange for money. *Dean v. State*, 293 Ark. 75, 732 S.W.2d 855 (1987).

Prescription of a controlled substance by a licensed physician is not "delivery" of a controlled substance. *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

The fact that an accused is the agent of a buyer or seller of drugs does not remove the transfer of rock cocaine from the coverage of subsection (f) (see now subdivision (6)). *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990).

To convict a defendant of delivery, the state had to prove that the defendant actually or constructively transferred drugs for value to another person; to convict one of possession, the state had to show that the defendant exercised control or dominion over it. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), cert. denied, 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

Under the definition of "deliver" in this section, it makes no difference whether the transferor acted as an agent of the purchaser or the seller; the act is condemned whenever the transfer is in exchange for money or anything of value. *Christian v. State*, 318 Ark. 813, 889 S.W.2d 717 (1994).

Where both a detective and a confidential informant testified as to the details of a controlled drug buy, the evidence showed that the informant was given \$250 in marked money, fitted with an audio device, sent to an apartment where he met defendant, and left the apartment with a baggie containing 1.7794 grams of methamphetamine which he gave to the detective. There was substantial evidence of "delivery" within the meaning of subdivision (7) (see now subdivision (6)) of this section to support defendant's conviction for delivery of methamphetamine; the district court did not err by denying defen-

dant's motion for a directed verdict. *Phavixay v. State*, 2009 Ark. 452, 352 S.W.3d 311 (2009).

Appellant's conviction for delivery of methamphetamine was affirmed because the jury was properly instructed that the witness's testimony must be corroborated and an officer and the witness both testified that the crime of delivery of methamphetamine occurred. *Hall v. State*, 2010 Ark. App. 717 (2010).

### **Drug Paraphernalia.**

Acts 1981, No. 78 which, in pertinent part added subsection (y) (see now subdivision (12)), is not unconstitutionally overbroad even though the act may prevent persons from utilizing the expressions imprinted on, or the symbolic speech represented by the use of, drug paraphernalia. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

Where defendants were arrested in a parking lot after buying various items, including three packages of antihistamines, four cans of starter fluid, butane, and an air freshener, the evidence was insufficient to support a conviction of possession of drug paraphernalia with intent to manufacture methamphetamines; all of the items seized were legally obtained and had legitimate uses, and suspicion alone cannot support a conviction. *Gilmore v. State*, 79 Ark. App. 303, 87 S.W.3d 805 (2002).

Trial court properly admitted evidence of defendant's prior crimes because they fell within the exception to Ark. R. Evid. 404(b) in that they were independently relevant as proof of knowledge and intent to commit an offense; further, in determining whether an object is drug paraphernalia, courts are directed to consider prior convictions and expert testimony concerning its use. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006).

Motion to dismiss was properly denied in a case involving possession with intent to use drug paraphernalia because a crack pipe constituted paraphernalia under this section; further, there was sufficient evidence of intent where defendant admitted the pipe was his, cocaine residue was found on the pipe, and defendant admitted to using it to smoke cocaine in the past. *White v. State*, 98 Ark. App. 366, 255 S.W.3d 881 (2007).

Sufficient evidence supported a finding that defendant possessed "drug parapher-

nal" within the meaning of this section, with the intent to manufacture methamphetamine because the jury could choose to believe that he knew the iodine he possessed was going to be used to make methamphetamine. *Ashley v. State*, 2012 Ark. App. 131, 388 S.W.3d 914 (2012).

### **Evidence.**

It is not essential to proof of the charge of attempting to deliver a controlled substance that the substance be produced in court if one sufficiently experienced with the substance could testify that it was indeed that substance. *Marshall v. State*, 289 Ark. 462, 712 S.W.2d 894 (1986).

Evidence was sufficient to meet test of substantiality and show delivery. *Summers v. State*, 300 Ark. 525, 780 S.W.2d 540 (1989).

Evidence was sufficient to establish delivery of controlled substance. *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991).

Court erroneously precluded state from introducing evidence of officer concerning use of antenna, found on the defendant, as drug paraphernalia. *State v. Crutchfield*, 306 Ark. 104, 816 S.W.2d 884 (1991) (supplemental op. on rehearing).

Evidence sufficient to support conviction for delivery of a controlled substance. *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

Evidence sufficient to find that appellant engaged in a conspiracy to deliver marijuana. *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

Where officer asked defendant for consent to search home and defendant stated he wanted to call his attorney and went back into the house, and officer simply followed defendant into the house, officer's entry into the home was illegal and not supported by unequivocal proof of consent required by state caselaw; therefore, products seized as a result of the illegal entry and search were fruit of the poisonous tree and should have been suppressed. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002).

Sufficient evidence was presented to the jury from which they could conclude that defendant possessed certain items for the purpose of manufacturing methamphetamine despite the fact that there was no evidence of lithium which was necessary to the manufacturing process. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003).



Evidence of manufacturing methamphetamine held sufficient where evidence other than the accomplices' testimony tended to a substantial degree to connect defendant with the commission of the crime, and where there was sufficient corroboration of the accomplices' testimony. *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

State's failure to prove that a substance was a statutorily-defined "counterfeit substance" was fatal to defendant's criminal conviction for possession of a counterfeit substance with the intent to deliver, especially where there was no evidence of attempted delivery; the only factor that the state proved was that the physical appearance of the finished product containing the noncontrolled substance was substantially the same as that of a specific controlled substance. *Jackson v. State*, 86 Ark. App. 145, 165 S.W.3d 467 (2004).

Evidence was sufficient to sustain a drug possession conviction where defendant was the driver of the car, the drugs were found directly behind the driver's seat, and he exercised dominion and control over the vehicle; in addition, defendant possessed 883.9 milligrams of the methamphetamine compound, which was a usable amount. *Jones v. State*, 357 Ark. 545, 182 S.W.3d 485 (2004).

Evidence was sufficient to sustain a drug paraphernalia possession conviction where the syringe in defendant's pocket was in close proximity to the methamphetamine found in the plastic bags behind his driver's seat. *Jones v. State*, 357 Ark. 545, 182 S.W.3d 485 (2004).

Given that defendant owned the premises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in his pocket, there was sufficient evidence whereby a jury could convict defendant of manufacturing methamphetamine. *Lucken v. State*, 88 Ark. App. 323, 198 S.W.3d 547 (2004).

Evidence was sufficient to sustain a conviction for possession of drug paraphernalia with intent to manufacture methamphetamine where the jury had before it evidence of the items found at defendant's residence and in his vehicle (including hydrogen peroxide, isopropyl alcohol, an empty can of toluene, lye, salt, drain cleaner, muriatic acid, allergy pills,

PVC gloves, a piece of tubing, and a syringe), but it was also informed of defendant's iodine purchase and of his prior convictions relating to methamphetamine in addition to the expert testimony concerning how the items found in defendant's possession are used to manufacture methamphetamine; neither statute nor case law required that all the ingredients necessary to manufacture methamphetamine be found in a defendant's possession. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006).

Based on the evidence indicating defendant's proximity to the manufacturing paraphernalia, the jury could reasonably infer that she had joint possession and control of the contraband; it was undisputed that defendant had been occupying the residence for at least two weeks and she was present in the residence when methamphetamine was being manufactured and that she knew methamphetamine was being manufactured. *Holt v. State*, 2009 Ark. 482, 348 S.W.3d 562 (2009).

Trial court clearly did not err in denying the motion for directed verdict or its renewal, because the evidence was sufficient to convict defendant of possession of a counterfeit controlled substance, when the soap substance was packaged in a quantity and shape that had all the outward indications of appearing to be crack cocaine, and defendant stated in response to the officer's query that he thought he was getting cocaine. *Caldwell v. State*, 2009 Ark. App. 526, 334 S.W.3d 82 (2009).

### **Manufacture and Production.**

Statute makes it clear that the growing or cultivation of marijuana is included in the offense of manufacturing; the definition of "manufacture" includes "production" and the definition of "production" includes "cultivation" of a controlled substance. *Shepherd v. State*, 256 Ark. 134, 506 S.W.2d 553, cert. denied, 419 U.S. 808, 95 S. Ct. 20, 42 L. Ed. 2d 34 (1974).

Manufacture as defined in this section does not include the preparation for one's own use. *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975).

Since the personal-use exemption provided for in subdivision (m) (now subdivision (14)) applies only to the preparation or compounding of a controlled substance and not to "production" which includes



cultivating or harvesting the substance, defendant, who admitted growing marijuana on his farm, was not within that exception to the offense of manufacturing marijuana. *Bedell v. State*, 260 Ark. 401, 541 S.W.2d 297 (1976), cert. denied, 430 U.S. 931, 97 S. Ct. 1552, 51 L. Ed. 2d 775 (1977).

The personal use exemption provided for in subdivision (m) (now subdivision (14)) did not apply to defendant who manufactured from marijuana seeds and plants a tea and juice which defendant claimed to drink for the cure and prevention of cancer. *Patty v. State*, 260 Ark. 539, 542 S.W.2d 494 (1976).

The substance does not have to be in a form to be sold before a "manufacture" occurs. *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989).

Although anhydrous ammonia, which was necessary to the methamphetamine manufacturing process, was not found, the state's chemist testified that ammonia was found, as well as other indications regarding the presence of anhydrous ammonia, which could not be specifically tested for, and that there was not an active manufacture taking place when the police arrived; thus, the chemist's testimony sufficiently explained the absence of the anhydrous ammonia in a lab where manufacturing had already occurred and the evidence was sufficient to convict defendant of manufacturing methamphetamine. *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004).

Evidence was sufficient to sustain a conviction for manufacturing methamphetamine where multiple ingredients and devices used in methamphetamine production were found together with the by-products of such production in defendant's van, as well as actual methamphetamine. *Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006).

Defense counsel was not ineffective for not objecting that defendants' convictions violated double jeopardy under § 5-1-110(b) because possession of drug paraphernalia with intent to manufacture methamphetamine was not a lesser-included offense of manufacturing methamphetamine. *Myers v. State*, 2012 Ark. 143, 400 S.W.3d 231 (2012).

### **Marijuana.**

In prosecution for sale of marijuana it was not necessary for the state to show

that the substance introduced into evidence as marijuana did not fall within any exemption provision of the definition of marijuana. *Garner v. State*, 258 Ark. 321, 524 S.W.2d 223 (1975); *Rogers v. State*, 258 Ark. 314, 524 S.W.2d 227, cert. denied, 423 U.S. 995, 96 S. Ct. 423, 46 L. Ed. 2d 369 (1975).

This section's definition of marijuana does not require the State to prove the presence of THC in order to obtain a conviction for possession of marijuana; lay testimony may provide substantial evidence of the identity of a controlled substance, even in the absence of expert chemical analysis. *Springston v. State*, 327 Ark. 90, 936 S.W.2d 550 (1997).

### **Narcotic Drug.**

Cocaine is defined as a "narcotic drug" under this section and is made a Schedule II controlled substance under the terms of a board regulation adopted in accordance with § 5-64-205. *Lively v. State*, 25 Ark. App. 198, 755 S.W.2d 238 (1988).

**Cited:** *Fight v. State*, 254 Ark. 927, 497 S.W.2d 262 (1973); *Sims v. State*, 255 Ark. 87, 499 S.W.2d 54 (1973); *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974); *Ark. State Medical Bd. v. Cross*, 256 Ark. 388, 507 S.W.2d 709 (1974); *Tate v. State*, 258 Ark. 135, 524 S.W.2d 624 (1975); *Ryan v. State*, 260 Ark. 270, 538 S.W.2d 702 (1976); *Hosto v. Brickell*, 265 Ark. 147, 577 S.W.2d 401 (1979); *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *Hays v. State*, 268 Ark. 701, 597 S.W.2d 821 (Ct. App. 1980); *Young v. State*, 269 Ark. 12, 598 S.W.2d 74 (1980); *Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982); *Jackson v. State*, 283 Ark. 301, 675 S.W.2d 820 (1984); *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985); *Weber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985); *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989); *Barlow v. State*, 28 Ark. App. 21, 770 S.W.2d 186 (1989); *Booker v. State*, 32 Ark. App. 94, 796 S.W.2d 854 (1990); *Smith v. State*, 34 Ark. App. 72, 805 S.W.2d 663 (1991); *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992); *Enos v. State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996); *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997); *Hyde v. State*, 59 Ark. App. 131, 953 S.W.2d 911 (1997); *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001); *Dod-*

son v. State, 88 Ark. App. 380, 199 S.W.3d 115 (2004); Benjamin v. State, 102 Ark. App. 309, 285 S.W.3d 264 (2008); Morgan v. State, 2009 Ark. 257, 308 S.W.3d 147 (2009).

SUBCHAPTER 2 — UNIFORM CONTROLLED SUBSTANCES ACT — DESIGNATION OF CONTROLLED SUBSTANCES

- SECTION.
- 5-64-201. Director’s duties.
  - 5-64-202. Nomenclature.
  - 5-64-203. Criteria for Schedule I.
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- SECTION.
- 5-64-209. Criteria for Schedule IV.
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  - 5-64-214. Criteria for Schedule VI.
  - 5-64-215. Substances in Schedule VI.
  - 5-64-216. Schedule revisions.

**Publisher’s Notes.** Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Department of Health or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

Acts 1979, No. 898, § 21 provided, in part, that the schedules in effect on July 20, 1979 should remain in effect until rescheduled.

For Comments regarding the Uniform Controlled Substances Act, see Commentaries Volume B.

**Effective Dates.** Acts 2005, No. 256, § 7: Mar. 24, 2005. Emergency clause provided: “It is hereby found and determined by the Eighty-fifth General Assembly that the effectiveness of this act is essential to the safety of the citizens of Arkansas; that excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine causes harm to citizens of Arkansas; and that a delay in the effective date of this act beyond thirty days needed to implement it would unnecessarily expose the citizens of Arkansas to the risk of irreparable harm. Therefore, an emergency is declared to exist and this act being immediately necessary for the

preservation of the public peace, health, and safety shall be effective on: (1) Thirty (30) days from and after the date of its passage and approval; (2) If the bill is neither approved nor vetoed by the Governor, it shall become effective thirty (30) days from the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, it shall become effective thirty (30) days from the date the last house overrides the veto.”

Acts 2011, No. 751, § 3: Mar. 28, 2011. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that new substances that need immediate scheduling are becoming more prevalent; and that this act is immediately necessary because these new substances pose a risk to the public. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”



**5-64-201. Director's duties.**

(a)(1)(A)(i) The Director of the Department of Health shall administer this chapter and may add a substance to or delete or reschedule any substance enumerated in a schedule under the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(ii) The director may promulgate without action or approval of the State Board of Health an emergency rule under the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq., that adds a substance to or deletes a substance from a schedule or reschedules a substance.

(iii) If the director adds, deletes, or reschedules a substance through an emergency rule under the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq., the emergency rule may be effective for no longer than one hundred eighty (180) days.

(B) However, the director shall not delete any substance from a schedule in effect on July 20, 1979, without prior approval by the Legislative Council.

(2) In making a determination regarding a substance, the director shall consider the following:

(A) The actual or relative potential for abuse;

(B) The scientific evidence of its pharmacological effect, if known;

(C) The state of current scientific knowledge regarding the substance;

(D) The history and current pattern of abuse;

(E) The scope, duration, and significance of abuse;

(F) The risk to public health;

(G) The potential of the substance to produce psychic or physiological dependence liability; and

(H) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

(b) After considering the factors enumerated in subsection (a) of this section, the director shall make findings with respect to the factors and issue a rule controlling the substance if he or she finds the substance has a potential for abuse.

(c) If the director designates a substance as an immediate precursor, a substance that is a precursor of the controlled precursor is not subject to control solely because it is a precursor of the controlled precursor.

(d)(1) If any substance is designated as a controlled substance under federal law and notice of the designation is given to the director, the director shall similarly control the substance under this chapter after the expiration of thirty (30) days from publication in the Federal Register of a final order designating a substance as a controlled substance unless within that thirty-day period the director objects to inclusion.

(2)(A) If the director objects to inclusion, the director shall publish the reasons for objection and afford any interested party an opportunity to be heard.



(B) At the conclusion of the hearing, the director shall publish his or her decision.

(C) Any person aggrieved by a decision of the director is entitled to judicial review in the Pulaski County Circuit Court.

(3) Upon publication of objection to inclusion under this chapter by the director, control under this chapter is stayed until the director publishes his or her decision or, if judicial review is sought, the inclusion is stayed until adjudication of the judicial review.

(e) Authority to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco.

(f) The director shall schedule gamma-hydroxybutyrate and its known precursors and analogs in a manner consistent with the procedures outlined in this section.

**History.** Acts 1971, No. 590, Art. 2, § 1; 1973, No. 186, § 1; 1979, No. 898, § 3; A.S.A. 1947, § 82-2602; Acts 2001, No. 320, § 2; 2005, No. 1994, § 302; 2011, No. 587, § 1.

**A.C.R.C. Notes.** Acts 2001, No. 320, § 1, provided:

“(a) Gamma-hydroxybutyrate (‘GHB’) was not scheduled as a controlled substance by the Federal Drug Enforcement Administration or by the Director of the Arkansas Department of Health prior to 1999. Concerned about the potential for the substance’s abuse, the Eighty-second General Assembly designated GHB as a Schedule VI controlled substance.

“(b) Subsequently, the Drug Enforcement Administration classified GHB as a Schedule I. In addition, the final rule of the Drug Enforcement Administration places Food and Drug Administration approved products containing GHB into

Schedule III, if or when they are approved.

“(c) Since the legislature classified GHB as a schedule VI substance, the Director was precluded from scheduling GHB in a manner consistent with the scheduling designated by the Drug Enforcement Administration. As a result, criminal sanctions for the possession with the intent to deliver GHB are not as severe as other substances possessing similar harmful and abusive characteristics.

“(d) It is the purpose of this act to allow the director to adopt the Drug Enforcement Administration’s scheduling of GHB pursuant to Arkansas Code 5-64-201.”

**Amendments.** The 2011 amendment substituted “Department of Health” for “Division of Health of the Department of Health and Human Services” in (a)(1)(A)(i); and added (a)(1)(A)(ii) and (iii).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General As-

sembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

## CASE NOTES

### ANALYSIS

Alcoholic Beverages.  
Delegation of Authority.  
Schedules.

### Alcoholic Beverages.

Where school board rule required automatic expulsion for students using “nar-

cotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971” (subchapters 1-6 of this chapter), alcohol was not a “controlled substance” under such rule since it is expressly exempted from the operation of the act by subsection (e) of this section. Board of Educ. v. McCluskey, 458 U.S. 966, 102 S. Ct. 3469, 73 L. Ed. 2d 1273

(1982).

**Delegation of Authority.**

Although subsection (d) provides that if a substance becomes controlled under federal law it shall also become controlled under state law, that same subsection has also always given the Commissioner the authority to reject the listing of any federally controlled substance; thus, there was no unlawful authority or delegation of legislative power given to the federal government to control the state schedules of controlled substances. *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983).

**Schedules.**

Schedule of controlled substances is a regulation promulgated by a state agency pursuant to statute and in accordance with state procedural requirements. The schedule or agency regulation is a part of the substantive law the trial court must determine and then apply to the facts of the case before it. *Washington v. State*, 319 Ark. 583, 892 S.W.2d 505 (1995).

**Cited:** *Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982); *Benjamin v. State*, 102 Ark. App. 309, 285 S.W.3d 264 (2008).

**5-64-202. Nomenclature.**

A controlled substance listed or to be listed in a schedule shall be included by whatever official, common, usual chemical, or trade name designated.

**History.** Acts 1971, No. 590, Art. 2, § 2; 1973, No. 186, § 1; 1979, No. 898, § 4; A.S.A. 1947, § 82-2603.

**5-64-203. Criteria for Schedule I.**

The Director of the Department of Health shall place a substance in Schedule I if he or she finds that the substance has:

- (1) High potential for abuse; and
- (2) No accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

**History.** Acts 1971, No. 590, Art. 2, § 3; 1973, No. 186, § 1; 1979, No. 898, § 5; A.S.A. 1947, § 82-2604.

**CASE NOTES**

**Cited:** *Pace v. State*, 267 Ark. 610, 593 S.W.2d 20 (1980).

**5-64-204. Substances in Schedule I.**

(a) In addition to any substance placed in Schedule I by the Director of the Department of Health under § 5-64-203, any material, compound, mixture, or preparation, whether produced directly or indirectly from a substance of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, that contains any quantity of the following substances, or that contains any of the following substances' analogs, salts, isomers, and salts of isomers when the existence of the analogs, salts, isomers, and salts of isomers is possible within the specific chemical designation, with the following chemical structure is included in Schedule I:

- (1) 4-Methylmethcathinone (Mephedrone);
- (2) Methylenedioxypropylvalerone (MDPV);
- (3) 3,4-Methylenedioxy-N-methylcathinone (Methylone);
- (4) 4-Methoxymethcathinone;
- (5) 3-Fluoromethcathinone;
- (6) 4-Fluoromethcathinone; or
- (7) A compound, unless listed in another schedule or a legend drug, that is structurally derived from 2-Amino-1-phenyl-1-propanone by modification or by substitution:

(A) In the phenyl ring to any extent with alkyl, alkoxy, alkylendioxy, haloalkyl or halide substituents, whether or not further substituted in the phenyl ring by one (1) or more other univalent substituents;

(B) At the 3-position with an alkyl substituent; or

(C) At the nitrogen atom with alkyl or dialkyl groups, or by inclusion of the nitrogen atom in a cyclic structure.

(b) The Director of the Department of Health shall not delete a controlled substance listed in this section from Schedule I.

**History.** Acts 2011, No. 751, § 1.

**Publisher's Notes.** The Uniform Controlled Substance Act (U.L.A.), § 204, lists the controlled substances included in Schedule I. Schedule I was originally adopted in Arkansas but was subsequently repealed and is now governed by this

section and administrative regulation. It is revised and republished annually by the Director of the Department of Health or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

## 5-64-205. Criteria for Schedule II.

The Director of the Department of Health shall place a substance in Schedule II if he or she finds that:

- (1) The substance has high potential for abuse;
- (2) The substance has currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions; and
- (3) The abuse of the substance may lead to severe psychic or physical dependence.

**History.** Acts 1971, No. 590, Art. 2, § 5; 1973, No. 186, § 1; 1979, No. 898, § 6; A.S.A. 1947, § 82-2606.

**A.C.R.C. Notes.** Acts 1987, No. 52, § 1, provided that dronabinol is a schedule II

drug instead of a schedule VI drug when it is in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the U.S. Food and Drug Administration for medical treatment.



## CASE NOTES

## ANALYSIS

Cocaine.

Delegation of Authority.

**Cocaine.**

Cocaine is defined as a "narcotic drug" under § 5-64-101 and is made a Schedule II controlled substance under the terms of a board regulation adopted in accordance with this section. *Lively v. State*, 25 Ark. App. 198, 755 S.W.2d 238 (1988).

**Delegation of Authority.**

This section, allowing the Commissioner to determine what particular substances should be placed in Schedule II, does not constitute an unlawful delegation of legislative authority to the Commissioner. *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983).

**Cited:** *Ark. State Medical Bd. v. Elliott*, 263 Ark. 86, 563 S.W.2d 427 (1978).

**5-64-206. [Reserved.]**

**Publisher's Notes.** The Uniform Controlled Substance Act (U.L.A.), § 206, lists the controlled substances included in Schedule II. Schedule II was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised

and republished annually by the Director of the Department of Health or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

**5-64-207. Criteria for Schedule III.**

The Director of the Department of Health shall place a substance in Schedule III if he or she finds that:

(1) The substance has a potential for abuse less than the substances listed in Schedules I and II;

(2) The substance has currently accepted medical use in treatment in the United States; and

(3) Abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

**History.** Acts 1971, No. 590, Art. 2, § 7; 1973, No. 186, § 1; 1979, No. 898, § 7; A.S.A. 1947, § 82-2608.

## CASE NOTES

**Cited:** *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983).

**5-64-208. [Reserved.]**

**Publisher's Notes.** The Uniform Controlled Substance Act (U.L.A.), § 208, lists the controlled substances included in Schedule III. Schedule III was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised

and republished annually by the Director of the Department of Health or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

**5-64-209. Criteria for Schedule IV.**

The Director of the Department of Health shall place a substance in Schedule IV if he or she finds that:

- (1) The substance has a low potential for abuse relative to substances in Schedule III;
- (2) The substance has currently accepted medical use in treatment in the United States; and
- (3) Abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in Schedule III.

**History.** Acts 1971, No. 590, Art. 2, § 9;  
1973, No. 186, § 1; 1979, No. 898, § 9;  
A.S.A. 1947, § 82-2610.

**CASE NOTES**

**Cited:** Curry v. State, 279 Ark. 153, 649  
S.W.2d 833 (1983).

**5-64-210. Substances in Schedule IV.**

Schedule IV includes any material, compound, mixture, or preparation that contains any quantity of tramadol or that contains any of tramadol's salts, isomers, or salts of isomers.

**History.** Acts 2007, No. 558, § 1; No. 585, § 1.

**Publisher's Notes.** The Uniform Controlled Substance Act (U.L.A.), § 210, lists the controlled substances included in Schedule IV. Schedule IV was originally adopted in Arkansas but was subsequently repealed and is now governed by

this section and administrative regulation. It is revised and republished annually by the Director of the Department of Health or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

**5-64-211. Criteria for Schedule V.**

The Director of the Department of Health shall place a substance in Schedule V if he or she finds that:

- (1) The substance has low potential for abuse relative to the controlled substances listed in Schedule IV;
- (2) The substance has currently accepted medical use in treatment in the United States; and
- (3) The substance has limited physical dependence or psychological dependence liability relative to the controlled substances listed in Schedule IV.

**History.** Acts 1971, No. 590, Art. 2,  
§ 11; 1973, No. 186, § 1; 1979, No. 898,  
§ 11; A.S.A. 1947, § 82-2612.

## CASE NOTES

**Cited:** *Miller v. State*, 253 Ark. 1060, 490 S.W.2d 445 (1973).

**5-64-212. Substances in Schedule V.**

(a) An ephedrine combination product, pseudoephedrine, and phenylpropanolamine, as defined in § 5-64-1105, are designated Schedule V controlled substances in addition to the drugs and other substances listed in Schedule V of the List of Controlled Substances for the State of Arkansas promulgated by the Director of the Department of Health.

(b) The Schedule V classification does not apply to:

(1) An exempt product described in § 5-64-1103(b)(1); or

(2) Any ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form described in § 5-64-1103(b)(2).

(c) The director may reschedule a product described in subdivision (b)(1) or subdivision (b)(2) of this section if it is determined that the conversion of the active ingredient in the product into methamphetamine or its salts or precursors is feasible.

(d) A wholesale distributor with exclusive rights to distribute pseudoephedrine to only licensed pharmacies is exempt from Schedule V requirements for the storage and distribution of pseudoephedrine.

**History.** Acts 2005, No. 256, § 2; 2011, No. 588, § 1.

**A.C.R.C. Notes.** Acts 2005, No. 256, § 1, provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practicable from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling

specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

**Publisher's Notes.** The Uniform Controlled Substance Act (U.L.A.), § 212, lists the controlled substances included in Schedule V. Schedule V was originally adopted in Arkansas but was subsequently repealed and is now governed by this section and administrative regulation. It is revised and republished annually by the Director of the Department of Health or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

**Amendments.** The 2011 amendment deleted (b)(3).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General As-

sembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.



**5-64-213. Schedule VI established.**

(a) There is established a Schedule VI for the classification of those substances that are determined to be inappropriately classified by placing them in Schedules I through V.

(b) Schedule VI includes a controlled substance listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated.

**History.** Acts 1971, No. 590, Art. 2, § 13, as added by Acts 1973, No. 186, § 1; A.S.A. 1947, § 82-2614.

**CASE NOTES**

**Cited:** *Baughman v. State*, 265 Ark. 869, 582 S.W.2d 4 (1979).

**5-64-214. Criteria for Schedule VI.**

The Director of the Department of Health shall place a substance in Schedule VI if he or she finds that:

(1) The substance is not currently accepted for medical use in treatment in the United States;

(2) There is lack of accepted safety for use of the drug or other substance even under direct medical supervision;

(3) The substance has relatively high psychological or physiological dependence liability, or both; and

(4) Use of the substance presents a definite risk to public health.

**History.** Acts 1971, No. 590, Art. 2, 1979, No. 898, § 12; A.S.A. 1947, § 82-§ 14, as added by Acts 1973, No. 186, § 1; 2614.1; Acts 2007, No. 827, § 56.

**5-64-215. Substances in Schedule VI.**

(a) In addition to any substance placed in Schedule VI by the Director of the Department of Health under § 5-64-214, any material, compound, mixture, or preparation, whether produced directly or indirectly from a substance of vegetable origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, that contains any quantity of the following substances, or that contains any of their salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation, is included in Schedule VI:

(1) Marijuana;

(2) Tetrahydrocannabinols;

(3) A synthetic equivalent of:

(A) The substance contained in the Cannabis plant; or

(B) The substance contained in the resinous extractives of the genus Cannabis;

(4) *Salvia divinorum* or Salvinorin A, which includes all parts of the plant presently classified botanically as *Salvia divinorum*, whether growing or not, the seeds of the plant, any extract from any part of the plant, and every compound, manufacture, derivative, mixture, or preparation of the plant, its seeds, or its extracts, including salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation;

(5) Synthetic substances, derivatives, or their isomers in the chemical structural classes described below in subdivisions (a)(5)(A)-(J) of this section and also specific unclassified substances in subdivision (a)(5)(K) of this section. Compounds of the structures described in this subdivision (a)(5), regardless of numerical designation of atomic positions, are included in this subdivision (a)(5). The synthetic substances, derivatives, or their isomers included in this subdivision (a)(5) are:

(A)(i) Tetrahydrocannabinols, including without limitation the following:

(a) Delta-1 cis or trans tetrahydrocannabinol, and its optical isomers;

(b) Delta-6 cis or trans tetrahydrocannabinol, and its optical isomers; and

(c) Delta-3.4 cis or trans tetrahydrocannabinol, and its optical isomers.

(ii) Dronabinol in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the United States Food and Drug Administration is not a tetrahydrocannabinol under this subdivision (a)(5)(A);

(B) Naphthoylindoles, or any compound structurally derived from 3-(1-naphthoyl)indole or 1H-indol-3-yl-(1-naphthyl)methane by substitution at the nitrogen atom of the indole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation the following:

(i) JWH-007, or 1-pentyl-2-methyl-3-(1-naphthoyl)indole;

(ii) JWH-015, or 1-Propyl-2-methyl-3-(1-naphthoyl)indole;

(iii) JWH-018, or 1-Propyl-3-(1-naphthoyl)indole;

(iv) JWH-019, or 1-Hexyl-3-(1-naphthoyl)indole;

(v) JWH-073, or 1-Butyl-3-(1-naphthoyl)indole;

(vi) JWH-081, or 1-Pentyl-3-(4-methoxy-1-naphthoyl)indole;

(vii) JWH-098, or 1-pentyl-2-methyl-3-(4-methoxy-1-naphthoyl)indole;

(viii) JWH-122, or 1-Pentyl-3-(4-methyl-1-naphthoyl)indole;

(ix) JWH-164, or 1-pentyl-3-(7-methoxy-1-naphthoyl)indole;

(x) JWH-200, or 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole;

(xi) JWH-210, or 1-Pentyl-3-(4-ethyl-1-naphthoyl)indole;

(xii) JWH-398, or 1-Pentyl-3-(4-chloro-1-naphthoyl)indole;

(xiii) AM-2201, or 1-(5-fluoropentyl)-3-(1-naphthoyl)indole;

(xiv) MAM2201, or 1-(5-fluoropentyl)-1H-indol-3-yl(4-methyl-1-naphthalenyl)-methanone; and

(xv) EAM2201, or 1-(5-fluoropentyl)-1H-indol-3-yl(4-ethyl-1-naphthalenyl)-methanone;

(C) Naphthylmethylindoles, or any compound structurally derived from an H-indol-3-yl-(1-naphthyl) methane by substitution at the nitrogen atom of the indole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation the following:

(i) JWH-175, or 1-Pentyl-1H-indol-3-yl-(1-naphthyl)methane; and

(ii) JWH-184, or 1-Pentyl-1H-3-yl-(4-methyl-1-naphthyl)methane;

(D) Naphthoylpyrroles, or any compound structurally derived from 3-(1-naphthoyl)pyrrole by substitution at the nitrogen atom of the pyrrole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the pyrrole ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation JWH-307, or (5-(2-fluorophenyl)-1-pentylpyrrol-3-yl)-naphthalen-1-ylmethanone;

(E) Naphthylmethylindenenes, or any compound structurally derived from 1-(1-naphthylmethyl)indene with substitution at the 3-position of the indene ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indene ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation JWH-176, or E-1-[1-(1-Naphthalenylmethylene)-1H-inden-3-yl]pentane;

(F) Phenylacetylindoles, or any compound structurally derived from 3-phenylacetylindole by substitution at the nitrogen atom of the indole ring with alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the phenyl ring to any extent, including without limitation the following:

(i) JWH-201, or 2-(4-methoxyphenyl)-1-(1-pentylindol-3-yl)ethanone;

(ii) JWH-203, or 1-Pentyl-3-(2-chlorophenylacetyl)indole;

(iii) JWH-250, or 1-Pentyl-3-(2-methoxyphenylacetyl)indole;

(iv) JWH-251, or 1-Pentyl-3-(2-methylphenylacetyl)indole; and

(v) RCS-8, or 1-(2-cyclohexylethyl)-3-(2-methoxyphenylacetyl)indole;

(G) Cyclohexylphenols, or any compound structurally derived from 2-(3-hydroxycyclohexyl)phenol by substitution at the 5-position of the phenolic ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)



1)ethyl group, whether or not substituted in the cyclohexyl ring to any extent, including without limitation the following:

(i) CP 47,497 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol;

(ii) Cannabicyclohexanol or CP 47,497 C8 homologue, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol; and

(iii) CP 55,940, or 5-(1,1-dimethylheptyl)-2-[(1R,2R)-5-hydroxy-2-(3-hydroxypropyl)cyclohexyl]-phenol;

(H) Benzoylindoles, or any compound structurally derived from a 3-(benzoyl)indole structure with substitution at the nitrogen atom of the indole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the phenyl ring to any extent, including without limitation the following:

(i) AM-694, or 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole;

(ii) RCS-4, or 1-Pentyl-3-(4-methoxybenzoyl)indole;

(iii) WIN-48,098 or Pravadoline, or (4-Methoxyphenyl)-[2-methyl-1-(2-(4-morpholinyl)ethyl)indol-3-yl]methanone;

(iv) AM-2233, or 1-[(N-methylpiperidin-2-yl)methyl]-3-(2-iodobenzoyl)indole; and

(v) RCS-4 (C4 homologue) or (4-methoxyphenyl)(1-butyl-1H-indol-3-yl)-methanone;

(I) Adamantoylindoles, or Adamantoylindazoles, including Adamantyl Carboxamide Indoles and Adamantyl Carboxamide Indazoles, or any compound structurally derived from 3-(1-adamantoyl)indole, 3-(1-adamantoyl)indazole, or 3-(2-adamantoyl)indole by substitution at a nitrogen atom of the indole or indazole ring with alkyl, haloalkyl, alkenyl, cyanoalkyl, hydroxyalkyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl)ethyl, whether or not further substituted in the indole or indazole ring to any extent and whether or not substituted in the adamantyl ring to any extent, including without limitation the following:

(i) AM-1248, or 1-adamantyl-[1-[(1-methylpiperidin-2-yl)methyl]indol-3-yl]methanone;

(ii) AB-001, or 1-adamantyl-(1-pentylindol-3-yl)methanone;

(iii) 2NE1, or 1-pentyl-3-(1-adamantylamido)indole;

(iv) JWH-018 adamantyl carboxamide, or 1-pentyl-N-tricyclo[3.3.1.1<sup>3,7</sup>]dec-1-yl-1H-indole-3-carboxamide;

(v) AKB-48, or N-(1-adamantyl)-pentyl-1H-indazole-3-carboxamide;

(vi) 5F-AKB-48, or N-((3s,5s,7s)-adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide; and

(vii) STS-135, or N-(1-adamantyl)-1-(5-fluoropentyl)indole-3-carboxamide;

(J) Tetramethylcyclopropylcarbonylindoles or any compound structurally derived from 3-(2,2,3,3-tetramethylcyclopropylcarbonyl)indole by substitution at the nitrogen atom of the indole ring with

alkyl, haloalkyl, alkenyl, cyanoalkyl, hydroxyalkyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl or 2-(4-morpholinyl)ethyl, whether or not further substituted in the indole ring to any extent, including without limitation the following:

(i) UR-144, or (1-pentylindol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone;

(ii) XLR-11, or [1-(5-fluoropentyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone;

(iii) A-796,260, or [1-(2-morpholin-4-yl-ethyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone;

(iv) 5-Chloro-UR-144, or [(5-chloropentyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone;

(v) 5-Bromo-UR-144, or [1-(5-bromopentyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone; and

(vi) A-834,735, or 1-(tetrahydropyran-4-ylmethyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone; or

(K) Unclassified Synthetic Cannabinoids, including without limitation the following:

(i) CP 50556-1 hydrochloride, or [(6S,6aR,9R,10aR)-9-hydroxy-6-methyl-3-[(2R)-5-phenylpentan-2-yl]oxy-5,6,6a,7,8,9,10,10a-octahydrophenanthridin-1-yl] acetate;

(ii) HU-210, or (6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;

(iii) HU-211, or Dexanabinol, (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;

(iv) Dimethylheptylpyran or DMHP;

(v) WIN55,212-2, or 2,3-Dihydro-5-methyl-3-(4-morpholinylmethyl)pyrrolo[1,2,3-de]-1,4-benzoxazin-6-yl-1-naphthalenylmethanone;

(vi) URB597, or [3-(3-carbamoylphenyl)phenyl] N-cyclohexylcarbamate;

(vii) URB754, or 6-methyl-2-[(4-methylphenyl)amino]-1-benzoxazin-4-one;

(viii) AKB-48, or N-(1-adamantyl)-1-pentylindazole-3-carboxamide;

(ix) CB-13, or 1-naphthalenyl[4-(pentyloxy)-1-naphthalenyl]methanone;

(x) URB602, or cyclohexyl N-(3-phenylphenyl)carbamate;

(xi) PB-22, or quinolin-8-yl 1-(5-pentyl)-1H-indole-3-carboxylate;

(xii) 5F-PB-22, or quinolin-8-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate;

(xiii) BB-22, or quinolin-8-yl 1-(cyclohexylmethyl)-1H-indole-3-carboxylate;

(xiv) NNEI (MN-24), or N-1-naphthalenyl-1-pentyl-1H-indole-3-carboxamide; and

(xv) 5F-NNEI, or 1-(5-fluoropentyl)-N-(naphthalen-1-yl)-1H-indole-3-carboxamide; or

(6) A synthetic substance, derivative, or its isomers with:

(A) Similar chemical structure to any substance described in subdivisions (a)(1)-(5) of this section; or

(B) Similar pharmacological effects to any substance described in subdivisions (a)(1)-(5) of this section.

(b) However, the director shall not delete a controlled substance listed in this section from Schedule VI.

**History.** Acts 1971, No. 590, Art. 2, § 15, as added by Acts 1973, No. 186, § 1; 1979, No. 898, § 22; A.S.A. 1947, § 82-2614.2; Acts 1999, No. 1534, § 1; 2001, No. 320, § 3; 2007, No. 827, § 57; 2011, No. 751, § 2; 2013, No. 329, § 1.

**A.C.R.C. Notes.** Acts 1987, No. 52, § 1, provided that dronabinol is a schedule II drug instead of a schedule VI drug when it is in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the U.S. Food and Drug Administration for medical treatment.

Acts 2001, No. 320, § 1, provided:

“(a) Gamma-hydroxybutyrate (‘GHB’) was not scheduled as a controlled substance by the Federal Drug Enforcement Administration or by the Director of the Arkansas Department of Health prior to 1999. Concerned about the potential for the substance’s abuse, the Eighty-second General Assembly designated GHB as a Schedule VI controlled substance.

“(b) Subsequently, the Drug Enforcement Administration classified GHB as a Schedule I. In addition, the final rule of the Drug Enforcement Administration places Food and Drug Administration approved products containing GHB into Schedule III, if or when they are ap-

proved.

“(c) Since the legislature classified GHB as a schedule VI substance, the Director was precluded from scheduling GHB in a manner consistent with the scheduling designated by the Drug Enforcement Administration. As a result, criminal sanctions for the possession with the intent to deliver GHB are not as severe as other substances possessing similar harmful and abusive characteristics.

“(d) It is the purpose of this act to allow the director to adopt the Drug Enforcement Administration’s scheduling of GHB pursuant to Arkansas Code 5-64-201.”

**Amendments.** The 2011 amendment added “In addition to any substance placed in Schedule VI by the Director of the Department of Health under § 5-64-214” in the introductory language of (a); subdivided (a)(3) as (a)(3) and (6); inserted (a)(4) and (5); and inserted “to any substance described in subdivisions (a)(1)-(4) of this section” in (a)(6)(A) and (B).

The 2013 amendment deleted former (a)(4); redesignated former (a)(5) as (a)(4); added present (a)(5); rewrote (a)(6); and substituted “director” for “Director of the Department of Health” in (b).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General As-

sembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

## CASE NOTES

### Marijuana.

Although his drug test indicated he had used methamphetamine and marijuana, defendant only admitted to marijuana use at the supervised release revocation hearing and the government did not attempt to prove defendant possessed methamphetamine. Defendant’s admission would only have qualified as a misdemeanor, which was a Grade C violation under U.S. Sentencing Guidelines Manual § 7B1.1(a)(3).

Thus, the district court’s consideration of the improper evidence of other pending state charges was not harmless error as defendant’s sentence would not have been the same. *United States v. Johnson*, 710 F.3d 784 (8th Cir. 2013).

**Cited:** *Hock v. State*, 259 Ark. 67, 531 S.W.2d 701 (1976); *White v. State*, 260 Ark. 361, 538 S.W.2d 550 (1976); *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977); *United States v. Heater*, 689 F.2d 783 (8th



Cir. 1982); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985).

5-64-216. Schedule revisions.

The Director of the Department of Health shall revise and republish the schedules annually.

**History.** Acts 1971, No. 590, Art. 2, § 16, as added by Acts 1973, No. 186, § 1; 1979, No. 898, § 13; A.S.A. 1947, § 82-2614.3.

RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislation of the 1983 General Assembly, Criminal Law, 6 U. Ark. Little Rock L.J. 613.

CASE NOTES

Failure to Revise.

The commissioner's (now director's) failure to revise and republish the schedules of controlled substances, at least where no allegation of the lack of actual notice was made, could not be used as a defense to a criminal prosecution under a part of the act as passed by the General Assembly. *Bushong v. State*, 267 Ark. 113, 589

S.W.2d 559 (1979), cert. denied, 446 U.S. 938, 100 S. Ct. 2157, 64 L. Ed. 2d 791 (1980).

**Cited:** *Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982); *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983); *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986).

SUBCHAPTER 3 — UNIFORM CONTROLLED SUBSTANCES ACT — REGULATION OF DISTRIBUTION

SECTION.  
5-64-301 — 5-64-304. [Reserved.]  
5-64-305. Powers of Arkansas State Board of Pharmacy — Sale of nonnarcotic drugs.

SECTION.  
5-64-306. Offenses relating to records.  
5-64-307. Order forms.  
5-64-308. Prescriptions.

**Publisher's Notes.** Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Department of Health or his or her

authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

CASE NOTES

**Cited:** *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

**5-64-301 — 5-64-304. [Reserved.]**

**Publisher's Notes.** Sections 301-304 of the Uniform Controlled Substances Act (U.L.A.) were not adopted in Arkansas. Those sections related to registration of persons who manufacture, distribute, or dispense controlled substances within the state.

**5-64-305. Powers of Arkansas State Board of Pharmacy — Sale of nonnarcotic drugs.**

(a)(1) Nothing contained in this chapter shall affect the licensing or regulation of pharmacists or pharmacies in this state by the Arkansas State Board of Pharmacy.

(2) The board may also inventory and destroy any outdated or unwanted controlled substance at the request of a licensee of the board with proper record of the destruction provided to appropriate agencies.

(3) The board is given primary but not exclusive jurisdiction in the enforcement application of this chapter to the board's licensees.

(b) Nothing in this chapter is deemed to prohibit the sale of a nonnarcotic proprietary drug if the nonnarcotic proprietary drug, under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., or the Food, Drug, and Cosmetic Act, § 20-56-201 et seq., may be lawfully sold over the counter without a prescription.

**History.** Acts 2005, No. 1994, § 304[A]. designated as § 304. The two sections

**Publisher's Notes.** As enacted, Acts 2005, No. 1994, contained two sections were subsequently designated § 304[A] and § 304[B].

**5-64-306. Offenses relating to records.**

It is unlawful for any person to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter.

**History.** Acts 2005, No. 1994, § 304[B]. designated as § 304. The two sections

**Publisher's Notes.** As enacted, Acts 2005, No. 1994, contained two sections were subsequently designated § 304[A] and § 304[B].

**5-64-307. Order forms.**

(a) A controlled substance in Schedule I or Schedule II shall be distributed by a practitioner to another practitioner only pursuant to an order form.

(b) Compliance with the provisions of federal law respecting an order form is deemed compliance with this section.

**History.** Acts 1971, No. 590, Art. 3, § 1; A.S.A. 1947, § 82-2615.

5-64-308. Prescriptions.

(a) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in Schedule II may be dispensed without the written prescription of a practitioner or the oral, faxed, or electronic prescription of a practitioner, if issued in compliance with federal law and regulations.

(b)(1) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a controlled substance included in Schedule III or Schedule IV that is a prescription drug shall not be dispensed without a written or oral prescription of a practitioner or the faxed or electronic prescription of a practitioner, if issued in compliance with federal law and regulations.

(2) The prescription shall not be filled or refilled more than six (6) months after the date of the prescription or be refilled more than five (5) times unless renewed by the practitioner.

(c) A controlled substance included in Schedule V shall not be distributed or dispensed other than for a medical purpose.

**History.** Acts 1971, No. 590, Art. 3, § 2; A.S.A. 1947, § 82-2616; Acts 2013, No. 1331, § 1.

**Amendments.** The 2013 amendment deleted “Written” from the section heading; added “or the oral, faxed, or electronic

prescription of a practitioner, if issued in compliance with federal law and regulations” to the end of (a); rewrote (b)(1) and (2); deleted (b)(3) and former (c); and redesignated former (d) as present (c).

CASE NOTES

**Forfeiture.**

In a case concerning the forfeiture of two vehicles, although one owner legally obtained controlled substances, his sale of them thereafter constituted a violation of the law prohibiting the dispensing of con-

trolled substances without a written prescription. *King v. State*, 2014 Ark. App. 554, 447 S.W.3d 126 (2014).

**Cited:** *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

SUBCHAPTER 4 — UNIFORM CONTROLLED SUBSTANCES ACT — PROHIBITIONS AND PENALTIES

SECTION.

- 5-64-401. [Repealed.]
- 5-64-402. Controlled substances — Offenses relating to records, maintaining premises, etc.
- 5-64-403. Controlled substances — Fraudulent practices.
- 5-64-404. Use of a communication device.
- 5-64-405. Continuing criminal enterprise.
- 5-64-406. Delivery to minors — Enhanced penalties.
- 5-64-407. Manufacture of methamphetamine in the presence of certain persons — Enhanced penalties.

SECTION.

- 5-64-408. Subsequent convictions — Enhanced penalties.
- 5-64-409. [Repealed.]
- 5-64-410. [Repealed.]
- 5-64-411. Proximity to certain facilities — Enhanced penalties.
- 5-64-412. Violations by public officials or law enforcement officers — Enhanced penalties.
- 5-64-413. [Repealed.]
- 5-64-414. Controlled substance analog.
- 5-64-415. Drug precursors.
- 5-64-416. [Repealed.]
- 5-64-417. Penalties under other laws.
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## SECTION.

- 5-64-419. Possession of a controlled substance.
- 5-64-420. Possession of methamphetamine or cocaine with the purpose to deliver.
- 5-64-421. [Reserved.]
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- 5-64-428. Possession of a Schedule III controlled substance with the purpose to deliver.
- 5-64-429. [Reserved.]
- 5-64-430. Delivery of a Schedule III controlled substance.
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## SECTION.

- 5-64-432. Possession of a Schedule IV or Schedule V controlled substance with the purpose to deliver.
- 5-64-433. [Reserved.]
- 5-64-434. Delivery of a Schedule IV or Schedule V controlled substance.
- 5-64-435. Manufacture of a Schedule IV or Schedule V controlled substance.
- 5-64-436. Possession of a Schedule VI controlled substance with the purpose to deliver.
- 5-64-437. [Reserved.]
- 5-64-438. Delivery of a Schedule VI controlled substance.
- 5-64-439. Manufacture of a Schedule VI controlled substance.
- 5-64-440. Trafficking a controlled substance.
- 5-64-441. Possession of a counterfeit substance.
- 5-64-442. Possession with the purpose to deliver, delivery, or manufacture of a counterfeit substance.
- 5-64-443. Drug paraphernalia.
- 5-64-444. Drug paraphernalia — Delivery to a minor.
- 5-64-445. Advertisement of a counterfeit substance or drug paraphernalia.
- 5-64-446. Civil or criminal liability.

**Publisher's Notes.** Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Department of Health or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

For Comments regarding the Uniform Controlled Substances Act, see Commentaries Volume B.

**Cross References.** Simultaneous possession of drugs and firearms, § 5-74-106.

**Effective Dates.** Acts 1972 (1st Ex. Sess.), No. 67, § 9: Mar. 6, 1972. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion re-

garding the application and effect of Act 590 of 1971; that the penalties prescribed in Act 590 are in need of clarification; that the problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in the enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1225, § 2: Feb. 12, 1976. Emergency

clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971 upon the manufacture, distribution, and dispensing of controlled substances and the penalty therefor; that existing provisions require deletion for clarification and for assistance in enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and, therefore, should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 78, § 7: became law without Governor's signature, Feb. 15, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an increasing problem of drug abuse in the State of Arkansas and that in order to protect the public health and safety immediate steps must be taken to enact a comprehensive Drug Paraphernalia Act and the immediate passage of this Act is necessary to accomplish this purpose; therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force from and after its passage and approval."

Acts 1981, No. 117, § 3: Feb. 19, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that theft of a controlled substance from a controlled premises should be included within the criminal penalties section of the Controlled Substances Act, and that this Act is immediately necessary to accomplish the same and thereby provide for the more effective and efficient enforcement of the Controlled Substances Act. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 787, § 10: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an increasing prob-

lem of counterfeit substances in the State of Arkansas and that in order to protect the public health and safety, immediate steps must be taken to establish a system of punishment for those possessing or distributing such substances. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1987, No. 1013, § 3: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1225 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 1268, § 11: Apr. 9, 1999. Emergency clause provided: "It is found and determined by the General Assembly that the illegal use of the drug methamphetamine has become a serious problem in this State; that, because the drug is relatively easy to make, many illegal methamphetamine labs are operating in the state; that this act increases penalties for drug paraphernalia used to manufacture methamphetamine; and that this act is immediately necessary to combat illegal drug production and use in this state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2013, No. 1460, § 17: effective on and after January 1, 2014.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.

Barrier, Render Unto Caesar: An Essay on Private Morals and Public Law, 4 U. Ark. Little Rock L.J. 511.

## CASE NOTES

**Cited:** *Barrington v. Norris*, 49 F.3d 440 (8th Cir. 1995); *Warren v. State*, 59 Ark. App. 155, 954 S.W.2d 298 (1997); *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997); *Bradford v. State*, 328 Ark.

701, 947 S.W.2d 1 (1997); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997); *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997).

## 5-64-401. [Repealed.]

**Publisher's Notes.** This section, concerning criminal penalties, was repealed by Acts 2011, No. 570, § 33. The section was derived from Acts 1971, No. 590, Art. 4, § 1; 1972 (1st Ex. Sess.), No. 67, § 1; 1972 (1st Ex. Sess.), No. 68, § 1; 1973, No. 186, §§ 2, 3; 1975, No. 305, § 2; 1977, No. 557, § 1; 1983, No. 306, § 1; 1983, No. 417, § 1; 1983, No. 787, §§ 3-5; 1985, No. 165, § 1; 1985, No. 472, § 1; 1985, No.

512, § 1; 1985, No. 669, § 1; A.S.A. 1947, § 82-2617; Acts 1989 (3rd Ex. Sess.), No. 82, §§ 1, 2; 1994 (2nd Ex. Sess.), No. 10, § 1; 1994 (2nd Ex. Sess.), No. 46, § 1; 1997, No. 1142, § 1; 1999, No. 1268, § 2; 2001, No. 753, § 1; 2003, No. 1336, § 2; 2005, No. 1994, § 305[A]; 2007, No. 547, § 1; 2007, No. 827, § 58; 2009, No. 572, § 1; 2009, No. 673, § 1; 2009, No. 748, § 26.

### 5-64-402. Controlled substances — Offenses relating to records, maintaining premises, etc.

(a) It is unlawful for any person:

(1) To refuse an entry into any premises for any inspection authorized by this chapter; or

(2) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, or other structure or place or premise that is resorted to by a person for the purpose of using or obtaining a controlled substance in violation of this chapter or that is used for keeping a controlled substance in violation of this chapter.

(b)(1) Any person who violates this section is guilty of a Class C felony.

(2) However, a violation of this section is a Class B felony if the violation is committed on or within one thousand feet (1,000') of the real property of a certified drug-free zone.

(c) As used in this section:

(1) "Certified drug-free zone" means:

(A) A city or state park;

(B) A public or private elementary or secondary school, public vocational school, or public or private college or university;

(C) A designated school bus stop as identified on the route list published by a public school district annually;



(D) A publically funded and administered multifamily housing development;

(E) A skating rink, Boys and Girls Club, YMCA, YWCA, community center, recreation center, or video arcade;

(F) A drug or alcohol treatment facility;

(G) A day care center;

(H) A church; or

(I) A shelter as defined in § 9-4-102; and

(2) "Recreation center" means a public place consisting of various types of entertainment including without limitation:

(A) Billiards or pool;

(B) Ping pong or table tennis;

(C) Bowling;

(D) Video games;

(E) Pinball machines; or

(F) Any other similar type of entertainment.

**History.** Acts 1971, No. 590, Art. 4, § 2; 1975 (Extended Sess., 1976), No. 1225, § 1; 1977, No. 557, § 2; A.S.A. 1947, § 82-2618; reen. Acts 1987, No. 1013, § 1; 1993, No. 1189, § 6; 2005, No. 1994, § 305[A]; 2007, No. 827, § 59; 2011, No. 570, § 34.

**A.C.R.C. Notes.** This section was reenacted by Acts 1987, No. 1013, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Acts 1993, No. 1189, § 1, provided: "(a) The General Assembly of the State of Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by school age juveniles and the growth of street gangs made up largely of school age juveniles. The General Assembly of the State of Arkansas

further finds that the number of school related crimes is increasing.

"(b) It is the intent of the General Assembly of the State of Arkansas to insure the safest possible learning environment for our students, teachers and other school employees."

Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Publisher's Notes.** As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

**Amendments.** The 2011 amendment rewrote the introductory paragraph of (c); inserted present (c)(1) and redesignated former (c)(1) through (5) as (c)(1)(A) through (E); added (c)(1)(F) through (I); and added (c)(2).

## CASE NOTES

### Evidence.

Evidence was sufficient to support conviction for operating a drug premises. *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

There was insufficient evidence to support a finding of constructive possession where there were no drugs found in plain view, in the common areas of the house, or in the bedroom occupied by defendant, and there were no statements by defendant or by anyone else suggesting that

defendant knew that drugs were kept in the house, used there, or sold there. *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998).

Given that defendant owned the premises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in his pocket, there was sufficient evidence whereby a jury could convict defendant of maintaining a drug premises. *Lueken v.*

State, 88 Ark. App. 323, 198 S.W.3d 547 (2004).

Evidence was sufficient to support defendant's conviction of maintaining a drug premises because it was undisputed that defendant owned the home where the methamphetamine lab was located and because defendant admitted to police officers that the methamphetamine lab was his. *Cantrell v. State*, 2009 Ark. 456, 343 S.W.3d 591 (2009).

Based upon the evidence, the circuit court's denial of defendant's directed-verdict motion on the offense of maintaining a drug premise was proper. *Holt v. State*, 2009 Ark. 482, 348 S.W.3d 562 (2009).

Defendant was properly found guilty of maintaining a drug premises, pursuant to subdivision (a)(2) of this section, because there was substantial evidence that defendant, who continued to live at the residence at the time of the search, was in constructive possession of the contraband found in the search, and an informant testified that he made three controlled drug buys from defendant at the residence. *Turner v. State*, 2009 Ark. App. 822 (2009).

Evidence was sufficient to convict defendant of maintaining a drug premises given that an acknowledged crack house was rented to him, a confidential informant testified that he purchased drugs from defendant a day earlier, the serial numbers of money found on defendant matched the money used in the controlled buy, and drugs and paraphernalia were in plain view throughout the home. *Carter v. State*, 2010 Ark. 293, 367 S.W.3d 544 (2010).

There was sufficient evidence to establish that defendant was in constructive possession of a drug premises under this section, as the state presented evidence that a house was leased to a co-defendant in the name of defendant's sister and that defendant sold controlled substances out of the house and allowed others to use controlled substances there. *Loggins v. State*, 2010 Ark. 414, 372 S.W.3d 785 (2010).

Substantial evidence supported defendant's conviction for maintaining a drug premises in violation of this section because at the very least, there was sufficient evidence to show that defendant knew drugs were being sold from the residence where he lived and that he al-

lowed it to occur; defendant informed a police officer that he would not find any drugs at the house, and that was supported by the allegations that defendant had been selling off-white substances in plastic baggies that field-tested positive for cocaine from the house in the days leading up to the search of the residence, as well as the fact that baggies with off-white residue were found in the master bedroom and hall closet during the search of the residence. *Moseby v. State*, 2010 Ark. App. 5 (2010).

Trial court did not err in convicting defendant of maintaining a drug premise because although the evidence was in conflict as to whether defendant kept or maintained the premise, it was the jury's duty to resolve such a conflict; it was apparent that the jury did not believe defendant's explanation or his wife's testimony. *Singleton v. State*, 2011 Ark. App. 145, 381 S.W.3d 874 (2011).

Because defendant was present in a room adjacent to a kitchen where two men were sitting with a clear plastic bag of cocaine between them, the evidence was sufficient to convict defendant of unlawful possession of a controlled substance (cocaine) and maintaining a drug premises under, *inter alia*, subdivision (a)(2) of this section. *McDaniel v. State*, 2011 Ark. App. 677 (2011).

Evidence was sufficient to support a conviction for maintaining a drug premises because appellant led an informant to an apartment for the purchase of drugs, a large amount of drugs were seized from the apartment five days later, and there were three drug-free zones within 1,000 feet of the apartment. *Robelo v. State*, 2012 Ark. App. 425, 421 S.W.3d 329 (2012).

Substantial evidence existed that defendant knew a dwelling was used to keep and sell controlled substances because defendant, after he was given money by a confidential informant in the living room of the trailer where defendant lived, went to a bedroom where defendant removed one gram of methamphetamine from a larger bag and placed it into a smaller bag that defendant gave to the informant. *Curtis v. State*, 2015 Ark. App. 167, 457 S.W.3d 700 (2015).

In a case involving drugs and weapons offenses, it was error to allow a video of law enforcement officers firing a weapon

found in the search of the home to be played for the jury and admitted into evidence because it was not relevant to any of the specific offenses charged as the offenses did not require that the weapon be fireable; however, the error was harmless because the evidence against defendant was overwhelming and defendant's sentences fell within the statutory sen-

tence ranges. *Gutierrez v. State*, 2015 Ark. App. 516, 472 S.W.3d 147 (2015).

**Cited:** *Jeffries v. State*, 255 Ark. 501, 501 S.W.2d 600 (1973); *Patty v. State*, 260 Ark. 539, 542 S.W.2d 494 (1976); *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977); *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994); *Stewart v. State*, 320 Ark. 75, 894 S.W.2d 930 (1995).

### **5-64-403. Controlled substances — Fraudulent practices.**

(a) It is unlawful for a person to knowingly:

(1) Distribute as a practitioner a Schedule I or Schedule II controlled substance, except under an order form as required by § 5-64-307;

(2) Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, or theft;

(3) Furnish false or fraudulent material information in or omit any material information from any record, application, report, or other document required to be kept or filed under this chapter;

(4) Make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another person or any likeness of any trademark, trade name, or other identifying mark, imprint, or device of another person upon any drug or container or labeling of a drug or container so as to render the drug a counterfeit substance; or

(5)(A) Agree, consent, or in any manner offer to unlawfully sell, furnish, transport, administer, or give any controlled substance to any person or to arrange for any action described in this subdivision (a)(5)(A), and then to substitute a noncontrolled substance in lieu of the controlled substance bargained for.

(B) The proffer of a controlled substance creates a rebuttable presumption of knowingly agreeing, consenting, or offering to sell, furnish, transport, administer, or give a noncontrolled substance that does not require additional showing of specific purpose to substitute a noncontrolled substance.

(b) A person who violates:

(1) Subdivision (a)(1), subdivision (a)(2), subdivision (a)(3), or subdivision (a)(4) of this section upon conviction is guilty of a Class D felony; or

(2) Subdivision (a)(5) of this section with respect to a noncontrolled substance represented to be a controlled substance classified in:

(A) Schedule I or Schedule II upon conviction is guilty of a Class C felony;

(B) Schedule III, Schedule IV, or Schedule V upon conviction is guilty of a Class D felony; or

(C) Schedule VI upon conviction is guilty of a Class A misdemeanor.



(c) A second or subsequent offense of attempt to violate subdivision (a)(1), subdivision (a)(2), subdivision (a)(3), or subdivision (a)(4) of this section is a Class D felony.

**History.** Acts 1971, No. 590, Art. 4, § 3; 1972 (1st Ex. Sess.), No. 67, § 2; 1977, No. 557, § 3; 1981, No. 78, § 2; 1981, No. 116, §§ 2, 3; 1981, No. 117, § 1; 1983, No. 787, § 6; A.S.A. 1947, § 82-2619; Acts 1999, No. 326, § 1; 1999, No. 1268, § 3; 2001, No. 1451, § 1; 2005, No. 1994, § 305[A]; 2007, No. 827, § 60; 2009, No. 748, § 27; 2011, No. 570, § 35; 2013, No. 1192, §§ 1, 2.

**A.C.R.C. Notes.** Acts 1999, No. 1268, § 1, provided: "This act shall be known as the 'Arkansas Methamphetamine Lab Act of 1999'."

Acts 2011, No. 570, § 1, provided: "The

intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2013, No. 1192, § 1, did not make changes to this section.

**Publisher's Notes.** As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

**Amendments.** The 2011 amendment rewrote the section.

The 2013 amendment by No. 1192, § 2 added (c).

## RESEARCH REFERENCES

**ALR.** Validity, Construction, and Application of State Trademark Counterfeiting Statutes. 63 A.L.R.6th 303.

**Ark. L. Rev.** Case Note, Harbison v. State: Just Say No to a Usable Amount, 45 Ark. L. Rev. 425.

**U. Ark. Little Rock L.J.** Legislative Survey, Criminal Law, 4 U. Ark. Little Rock L.J. 583.

Legislation of the 1983 General Assembly, Criminal Law, 6 U. Ark. Little Rock L.J. 613.

## CASE NOTES

### ANALYSIS

Fraudulent Prescription.  
Substitution of Noncontrolled Substance.

### Fraudulent Prescription.

In a prosecution for obtaining a controlled substance with a fraudulent prescription even though the substance in the prescription bottle was not chemically tested, testimony of a licensed pharmacist that he filled prescription bottle from his larger container of controlled substance was sufficient to sustain conviction. Arm-

strong v. State, 5 Ark. App. 96, 633 S.W.2d 51 (1982).

### Substitution of Noncontrolled Substance.

Evidence sufficient to support conviction of defendant who represented counterfeit pills to be amphetamines. Honea v. State, 15 Ark. App. 382, 695 S.W.2d 391 (1985).

**Cited:** Adams v. State, 269 Ark. 601, 599 S.W.2d 437 (Ct. App. 1980); Finney v. State, 3 Ark. App. 180, 623 S.W.2d 847 (1981).

## 5-64-404. Use of a communication device.

(a)(1) As used in this section, "communication device" means any public or private instrumentality used or useful in the transmission of a writing, sign, signal, picture, or sound of any kind.

(2) "Communication device" includes mail, telephone, wire, radio, and any other means of communication.

(b) A person commits the offense of unlawful use of a communication device if he or she knowingly uses any communication device in

committing or in causing or facilitating the commission of any act constituting a:

- (1) Felony under this chapter; or
- (2) Felony inchoate offense under § 5-3-101 et seq. or this chapter.
- (c) Each separate use of a communication device is a separate offense under this section.
- (d) Any person who violates this section upon conviction is guilty of a Class C felony.

**History.** Acts 1971, No. 590, Art. 4, § 4; A.S.A. 1947, § 82-2620; Acts 2005, No. 1994, § 305[A]; 2007, No. 827, § 61; 2011, No. 570, § 36

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction

costs.”

**Publisher’s Notes.** As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

**Amendments.** The 2011 amendment inserted “upon conviction” in (d).

### 5-64-405. Continuing criminal enterprise.

(a) A person commits the offense of engaging in a continuing criminal enterprise if he or she:

- (1) Violates any provision of this chapter that is a felony, except §§ 5-64-419 and 5-64-441; and
- (2) The violation is a part of a continuing series of two (2) or more felony offenses of this chapter, except §§ 5-64-419 and 5-64-441:

(A) That are undertaken by that person in concert with five (5) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management; and

(B) From which that person obtained substantial income or resources.

(b)(1) A person who engages in a continuing criminal enterprise upon conviction is guilty of an unclassified felony and shall be sentenced to a term of imprisonment up to two (2) times the term otherwise authorized for the underlying offense referenced in subdivision (a)(1) of this section and shall be fined an amount up to two (2) times that authorized for the underlying offense referenced in subdivision (a)(1) of this section.

(2) For any purpose other than disposition, engaging in a continuing criminal enterprise is a Class Y felony.

(c)(1) A person who violates subsection (a) of this section after a previous conviction under subsection (a) of this section has become final upon conviction is guilty of an unclassified felony and shall be punished by a term of imprisonment not exceeding three (3) times that authorized for the underlying offense referenced in subdivision (a)(1) of this section and a fine not exceeding three (3) times the amount authorized for the underlying offense referenced in subdivision (a)(1) of this section.

(2) For any purpose other than disposition, engaging in a continuing criminal enterprise is a Class Y felony.

(d)(1) Upon conviction, the prosecuting attorney may institute a civil action against any person who violates this section to obtain a judgment against all persons who violate this section, jointly and severally, for damages in an amount equal to three (3) times the proceeds acquired by all persons involved in the enterprise or by reason of conduct in furtherance of the enterprise, together with costs incurred for resources and personnel used in the investigation and prosecution of both criminal and civil proceedings.

(2) The standard of proof in an action brought under this section is a preponderance of the evidence.

(3) The procedures in the asset forfeiture law, § 5-64-505, shall apply.

(4) A defendant in a civil action brought under this subsection is entitled to a trial by jury.

(e) An offender found guilty of a violation of this section shall not:

- (1) Have his or her sentence suspended;
- (2) Be placed on probation;
- (3) Have imposition of sentence suspended;
- (4) Have the execution of the sentence deferred;
- (5) Have the sentence deferred; or
- (6) Be eligible for § 16-93-301 et seq.

**History.** Acts 1971, No. 590, Art. 4, § 5; A.S.A. 1947, § 82-2621; Acts 2005, No. 1994, § 305[A]; 2011, No. 570, § 37; 2013, No. 1125, § 12.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Publisher's Notes.** As enacted, Acts 2005, No. 1994, contained two sections

designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

**Amendments.** The 2011 amendment substituted "§§ 5-64-419 and 5-64-441" for "§ 5-64-401(c)" in (a)(1) and (a)(2); inserted "upon conviction" and "unclassified" in (b)(1) and (c)(1); and deleted "upon conviction" preceding "shall be" in (b)(1).

The 2013 amendment added "deferred" in (e)(4).

## CASE NOTES

### ANALYSIS

Constitutionality.

Elements.

Position of Management.

Sentencing.

### Constitutionality.

The language "two or more felony offenses" is sufficiently clear to survive a vagueness challenge. *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993) (decision under prior law).

There is no fatal vagueness problem in the requirement that a criminal enter-

prise defendant must have received "substantial income or resources" from his or her activity. *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993) (decision under prior law).

Simultaneous conviction and sentence for continuing criminal enterprise and its predicate felony offenses do not violate the protection against multiple punishments for the same offense afforded by the federal and Arkansas constitutional double jeopardy clauses, U.S. Const. Amend. 5 and Ark. Const., Art. 5, § 8. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995) (decision under prior law).



**Elements.**

In order to prove the continuing criminal enterprise offense under this section, one of the necessary elements is that the defendant committed “two or more felony offenses” which are part of the Controlled Substances Act. *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993) (decision under prior law).

**Position of Management.**

The management element is established by demonstrating that the defendant exerted some type of influence over another individual as exemplified by that

individual’s compliance with the defendant’s directions, instruction, or terms. *Hughey v. State*, 310 Ark. 721, 840 S.W.2d 183 (1992) (decision under prior law).

**Sentencing.**

Based on examination of this section and on § 5-1-110 as amended by Acts 1995, No. 595, the General Assembly intended to authorize separate punishments for violations of this section and the underlying substantive predicate offenses. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995) (decision under prior law).

**5-64-406. Delivery to minors — Enhanced penalties.**

(a) Any person eighteen (18) years of age or older who violates § 5-64-422, § 5-64-426, or § 5-64-440 by delivering or trafficking a Schedule I or Schedule II controlled substance that is a narcotic drug or methamphetamine to a person under eighteen (18) years of age who is at least three (3) years younger than the person is subject to an enhanced sentence of the fine authorized by § 5-64-422, § 5-64-426, or § 5-64-440, a term of imprisonment of up to two (2) times that authorized by § 5-64-422, § 5-64-426, or § 5-64-440, or both.

(b) Any person eighteen (18) years of age or older who violates § 5-64-426, § 5-64-430, § 5-64-434, § 5-64-438, or § 5-64-440 by delivering or trafficking any other controlled substance to a person under eighteen (18) years of age who is at least three (3) years younger than the person is subject to an enhanced sentence of the fine authorized by § 5-64-426, § 5-64-430, § 5-64-434, § 5-64-438, or § 5-64-440, a term of imprisonment up to two (2) times that authorized by § 5-64-426, § 5-64-430, § 5-64-434, § 5-64-438, or § 5-64-440, or both.

(c) A person who is not otherwise subject to an enhancement to his or her sentence as provided in subsection (a) or subsection (b) of this section and is convicted of delivering a controlled substance to a person under eighteen (18) years of age is subject to an additional term of imprisonment of ten (10) years.

**History.** Acts 1971, No. 590, Art. 4, § 6; A.S.A. 1947, § 82-2622; Acts 2005, No. 1994, § 475; 2011, No. 570, § 38.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Amendments.** The 2011 amendment rewrote (a) and (b); and added (c).

**5-64-407. Manufacture of methamphetamine in the presence of certain persons — Enhanced penalties.**

(a) A person who is found guilty of or who pleads guilty or nolo contendere to manufacture of methamphetamine, § 5-64-423, or possession of drug paraphernalia with the purpose to manufacture meth-

amphetamine, § 5-64-443(b), may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the offense is committed:

(1) In the presence of a minor, elderly person, or incompetent person who may or may not be related to the person;

(2) With a minor, elderly person, or incompetent person in the same home or building where the methamphetamine was being manufactured or where the drug paraphernalia to manufacture methamphetamine was in use or was in preparation to be used; or

(3) With a minor, elderly person, or incompetent person present in the same immediate area or in the same vehicle at the time of the person's arrest for the offense.

(b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person sentenced under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

(d) As used in this section:

(1) "Elderly person" means any person seventy (70) years of age or older;

(2) "Incompetent person" means any person who is incapable of consent because he or she is physically helpless, mentally defective, or mentally incapacitated; and

(3) "Minor" means any person under eighteen (18) years of age.

**History.** Acts 1971, No. 590, Art. 4, § 7; 1972 (1st Ex. Sess.), No. 67, § 3; 1973, No. 186, § 4; A.S.A. 1947, § 82-2623; Acts 1995, No. 998, § 2; 2005, No. 1994, § 304[B]; 2007, No. 200, § 1; 2007, No. 1047, § 3; 2011, No. 570, § 39.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction

costs."

**Publisher's Notes.** As enacted, Acts 2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

**Amendments.** The 2011 amendment, in (a), substituted "§ 5-64-423" for "§ 5-64-401(a)(1)" and "§ 5-64-443(a)(1)" for "§ 5-64-403(c)(5)".

### 5-64-408. Subsequent convictions — Enhanced penalties.

(a) Unless otherwise provided in this chapter, a person convicted of a second or subsequent offense under this chapter shall be imprisoned for a term up to two (2) times the term otherwise authorized, fined an amount up to two (2) times the fine otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense if, before his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to a narcotic drug, marijuana, depressant, stimulant, or a hallucinogenic drug.

(c) This section does not apply to an offense under § 5-64-419 or § 5-64-441.

**History.** Acts 1971, No. 590, Art. 4, § 8; 1973, No. 186, § 5; A.S.A. 1947, § 82-2624; 2005, No. 1994, § 304[B]; 2011, No. 570, § 40.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Publisher’s Notes.** As enacted, Acts 2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

**Amendments.** The 2011 amendment inserted “Unless otherwise provided in this chapter” in (a); and substituted “§ 5-64-419 or § 5-64-441” for “§ 5-64-401(c)” in (c).

## CASE NOTES

### ANALYSIS

Cruel and Unusual Punishment.  
Due Process of Law.  
Equal Protection.  
Habitual Criminals.  
Sentencing.

#### Cruel and Unusual Punishment.

Doubling a sentence for a person convicted twice for a drug-related offense is not cruel and unusual punishment. *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979).

#### Due Process of Law.

The defendant was not deprived of due process of law where circuit court, on defendant’s conviction of possession of heroin with intent to deliver after his conviction of other drug offenses, patterned its procedures for fixing punishment after those provided in the habitual criminal act. *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976).

#### Equal Protection.

This section in doubling of the normal penalty imposed for a drug violation upon a second conviction, does not violate the right to equal protection of the laws because it authorizes a more severe punishment than that provided for in the general Habitual Offender Act. *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979).

#### Habitual Criminals.

This section, which was enacted after § 5-4-501, does not preclude sentencing a habitual criminal under § 5-4-501. When two punishment statutes exist, a court is not prevented from using the more strin-

gent provision. *Russell v. State*, 295 Ark. 619, 751 S.W.2d 334 (1988).

#### Sentencing.

If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, supreme court is not at liberty to reduce it even if court believes the sentence to be unduly harsh. *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990).

Appellant filed a petition for writ of habeas corpus that challenged the judgment that imposed an aggregate sentence of 1080 months’ imprisonment for possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. The trial court did not err by denying appellant’s petition, because he presented only conclusory allegations to support his claim that his sentence was improperly enhanced under this section using an out-of-state conviction. *Darrough v. State*, 2013 Ark. 28 (2013).

Petitioner’s post-conviction claim that his sentence was illegal because the jury only gave the numbers “70” and “20” and did not specify years or months was rejected, because 70 months would fall short of the 20-year mandatory minimum for his cocaine conviction and 20 months would fall short of the eight-year minimum for his marijuana conviction, pursuant to former § 5-64-401 and subsection (a) of this section. *Lewis v. State*, 2013 Ark. 105 (2013).

**Cited:** *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977); *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Whitney v. State*, 326 Ark. 206, 930 S.W.2d 343 (1996).



**5-64-409. [Repealed.]**

**Publisher's Notes.** This section, concerning breaking or entering to steal a controlled substance, was repealed by Acts 2005, No. 1994, § 497. The section

was derived from Acts 1971, No. 590, Art. 4, § 9, as added by Acts 1972 (1st Ex. Sess.), No. 67, § 6; A.S.A. 1947, § 82-2624.1.

**5-64-410. [Repealed.]**

**Publisher's Notes.** This section, concerning penalties for delivery — enhanced penalties, was repealed by Acts 2011, No. 570, § 41. The section was derived from Acts 2005, No. 1994, § 305[B].

Former § 5-64-410, concerning en-

hanced penalties for distribution near a school or college, was repealed by Acts 1991, No. 864, § 2. The former section was derived from Acts 1989, No. 612, § 1. For current law, see § 5-64-411.

**5-64-411. Proximity to certain facilities — Enhanced penalties.**

(a) A person is subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if:

(1) The person:

(A) Possesses a controlled substance in violation of § 5-64-419 and the offense is a Class C felony or greater; or

(B) Possesses with the purpose to deliver, delivers, manufactures, or trafficks a controlled substance in violation of §§ 5-64-420 — 5-64-440; and

(2) The offense is committed on or within one thousand feet (1,000') of the real property of:

(A) A city or state park;

(B) A public or private elementary or secondary school, public vocational school, or private or public college or university;

(C) A designated school bus stop as identified on the route list published by a public school district each year;

(D) A skating rink, Boys and Girls Club, YMCA, YWCA, community center, recreation center, or video arcade;

(E) A publicly funded and administered multifamily housing development;

(F) A drug or alcohol treatment facility;

(G) A day care center;

(H) A church; or

(I) A shelter as defined in § 9-4-102.

(b) The enhanced portion of the sentence is consecutive or concurrent to any other sentence imposed at the discretion of the court.

(c) Any person convicted under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

(d)(1) Except for property covered by subdivision (a)(2)(C) of this section, property covered by this section shall have a notice posted at the entrances to the property stating:

“THE SALE OF DRUGS UPON OR WITHIN ONE THOUSAND FEET (1000') OF THIS PROPERTY MAY SUBJECT THE SELLER OF THE

## DRUGS TO AN ADDITIONAL TEN (10) YEARS IMPRISONMENT IN ADDITION TO THE TERM OF IMPRISONMENT OTHERWISE PROVIDED FOR THE UNLAWFUL SALE OF DRUGS."

(2) However, the posting of the notice is not a necessary element for the enhancement of a sentence under this section.

(e) As used in this section, "recreation center" means a public place of entertainment consisting of various types of entertainment, including without limitation billiards or pool, ping pong or table tennis, bowling, video games, pinball machines, or any other similar type of entertainment.

**History.** Acts 1989 (3rd Ex. Sess.), No. 88, § 1; 1991, No. 864, § 1; 1995, No. 778, § 1; 1995, No. 799, § 1; 1997, No. 1056, § 1; 2001, No. 1553, § 12; 2003, No. 1707, § 1; 2005, No. 195, § 1; 2005, No. 1994, § 305[B]; 2007, No. 345, § 1; 2007, No. 827, § 62; 2007, No. 1047, § 3; 2011, No. 570, § 42.

**A.C.R.C. Notes.** Acts 2007, No. 827, § 62 provides: "Acts 1995, No. 778, § 1, is repealed due to a conflict between that act and Acts 1995, No. 779, § 1, in amending § 5-64-411, and which conflict under § 1-2-207 is resolved in favor of Acts 1995, No. 779."

Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce re-

civism, hold offenders accountable, and contain correction costs."

**Publisher's Notes.** As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

**Amendments.** The 2011 amendment rewrote the introductory language in (a); inserted (a)(1) and (2) and redesignated former (a)(1) through (9) as (a)(2)(A) through (I); in (a)(2)(D), substituted "community center" for "or community or" and added "or video arcade"; in (b), inserted "or concurrent" and "at the discretion of the court"; and substituted "(a)(2)(C)" for "(a)(3)" in (d)(1).

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — Criminal Law, 14 U. Ark. Little Rock L.J. 753.

Survey of Legislation, 2003 Arkansas

General Assembly, Criminal Law, Controlled Substances, 26 U. Ark. Little Rock L. Rev. 366.

## CASE NOTES

### ANALYSIS

Ineffective Assistance of Counsel.  
Preservation for Review.

### Ineffective Assistance of Counsel.

In an Ark. R. Crim. P. 37.1 case in which an inmate had been convicted of one count of delivery of a controlled substance and received an enhanced sentence pursuant to subdivision (a)(7) of this section (now subdivision (a)(2)(H)), he unsuccessfully argued that his trial counsel was ineffective for failing to move for a continuance following the state's amendment of the charging information. While his timeline

regarding the informant's controlled buy from him and the police officer's measurement of the distance between the church and the sale location was correct, he failed to cite any authority for the proposition that trial counsel had a duty to ask for a continuance based thereon, and trial counsel made the tactical decision to proceed with the trial as scheduled. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (2010).

In an Ark. R. Crim. P. 37.1 case in which an inmate had been convicted of one count of delivery of a controlled substance and received an enhanced sentence pursuant to subdivision (a)(7) of this section (now

subdivision (a)(2)(H)), he unsuccessfully argued that his trial counsel was ineffective because he failed to adequately investigate the facts underlying the application of the enhancement prior to trial or to flesh them out appropriately during cross-examination. As to the failure to investigate, the inmate made only a conclusory statement, wholly lacking in allegations of prejudice; as to the cross-examination claim, his argument provided him no relief as he was procedurally barred from raising it on appeal. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (2010).

#### **Preservation for Review.**

Defendant failed to preserve for appeal the issue that the state did not put him on notice that it was seeking the sentencing enhancement, because defendant failed to raise the issue of notice at trial, which precluded the appellate court from addressing it on appeal. *Bell v. State*, 101 Ark. App. 144, 272 S.W.3d 110 (2008).

**Cited:** *McCoy v. State*, 326 Ark. 104, 929 S.W.2d 712 (1996).

### **5-64-412. Violations by public officials or law enforcement officers — Enhanced penalties.**

(a) As used in this section:

(1) “Law enforcement officer” means any member of the Department of Arkansas State Police or the Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department and any other certified law enforcement officer employed full time by the State of Arkansas or any political subdivision of the State of Arkansas or court personnel in Arkansas; and

(2) “Public official” means any person holding or appointed to an elective office of state, county, or city government and any member of any board or commission of state, county, city, or local government including an improvement district or school district.

(b) Any public official or law enforcement officer who commits a felony violation of this chapter shall have any term of imprisonment imposed for the violation enhanced by a term not to exceed ten (10) years and a fine of not less than ten thousand dollars (\$10,000).

**History.** Acts 1989 (3rd Ex. Sess.), No. 80, § 1, 2; 2005, No. 1994, § 305[B].

**Publisher’s Notes.** As enacted, Acts 2005, No. 1994, contained two sections

designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

### **5-64-413. [Repealed.]**

**Publisher’s Notes.** This section, concerning probation, discharge and dismissal, was repealed by Acts 2013, No. 1460, § 2. The section was derived from Acts 2005, No. 1994, § 305[B]; 2011, No. 570, § 43; 2011, No. 626, § 2; 2013, No. 1460, § 2.

Former § 5-64-413, concerning controlled substance analogs, was repealed by Acts 2005, No. 1994, § 305[B]. The section was derived from Acts 1989 (3rd Ex. Sess.), No. 83, § 1; 2001, No. 320, § 3[4]. For current provisions, see § 5-64-414.

### **5-64-414. Controlled substance analog.**

(a)(1) “Controlled substance analog” means a substance:



(A) The chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or Schedule II or that has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or Schedule II; or

(B) With respect to a particular individual, that the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or Schedule II.

(2) "Controlled substance analog" does not include:

(A) A controlled substance;

(B) A substance for which there is an approved new drug application;

(C) A substance with respect to which an exemption is in effect for investigational use by a particular person under § 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, to the extent conduct with respect to the substance is pursuant to the exemption; or

(D) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(b) A controlled substance analog, to the extent intended for human consumption, is treated for the purposes of this chapter as a substance included in Schedule I.

(c) Within ten (10) days after the initiation of prosecution with respect to a controlled substance analog by indictment or information, the prosecuting attorney shall notify the Director of the Department of Health of information relevant to emergency scheduling as provided for in § 5-64-201(d).

(d) After final determination that the controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may continue or take place.

**History.** Acts 1989 (3rd Ex. Sess.), No. 84, § 1; 2005, No. 1994, § 306.

### **5-64-415. Drug precursors.**

(a) **DEFINITION.**

(1) "Drug precursor" means any substance, material, compound, mixture, or preparation listed in rules and regulations promulgated or adopted pursuant to this section or any of their salts or isomers.

(2) "Drug precursor" specifically excludes those substances, materials, compounds, mixtures, or preparations that:

(A) Are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance that is generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., as amended; or

(B) Have been manufactured, distributed, or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of § 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, as amended.

(b) AUTHORITY TO CONTROL DRUG PRECURSORS BY RULE AND REGULATION.

(1)(A) The Department of Health shall promulgate by rule and regulation a list of drug precursors, comprised of any substance, material, compound, mixture, or preparation or any of their salts or isomers that are drug precursors.

(B) The Department of Health may add substances to, delete substances from, and reschedule substances listed in the drug precursors list pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(2) In making a determination regarding a substance to be placed on the drug precursor list, the Department of Health shall consider the following:

(A) Whether the substance is an immediate precursor of a controlled substance;

(B) The actual or relative potential for abuse;

(C) The scientific evidence of the substance's pharmacological effect, if known;

(D) The state of current scientific knowledge regarding the substance or the controlled substance for which it is a precursor;

(E) The history and current pattern of abuse of the controlled substance for which the substance is a precursor;

(F) The scope, duration, and significance of abuse of the controlled substance for which the substance is a precursor;

(G) The risk to the public health; and

(H) The potential of the substance or the controlled substance to produce psychic or physiological dependence liability.

(3) The Department of Health may consider findings of the United States Food and Drug Administration or the United States Drug Enforcement Administration as prima facie evidence relating to one (1) or more of the factors listed in subdivision (b)(2) of this section in connection with the Department of Health's determination.

(4)(A) After considering the factors enumerated in subdivision (b)(2) of this section, the Department of Health shall make findings with respect to the factors and shall promulgate a rule controlling a substance as a drug precursor upon a finding that the substance has a potential for abuse.

(B) If the Department of Health designates a substance as an immediate drug precursor, a substance that is a precursor of the controlled precursor is not subject to control solely because it is a precursor of the controlled precursor.

(5) Authority to control under this section does not extend to an alcoholic beverage, alcoholic liquor, a fermented malt beverage, or tobacco.

(c) LICENSE REQUIRED — CONTROLLED SUBSTANCES DRUG PRECURSORS.

(1)(A) The Department of Health may promulgate regulations and charge reasonable fees of not more than twenty-five dollars (\$25.00) relating to the licensing and control of the manufacture, possession, transfer, and transportation of a drug precursor.

(B)(i) There is created on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State, a cash fund to be known as the "Health Department Drug Precursor Cash Fund".

(ii) The fees established under this subsection shall be collected by the Department of Health and transmitted to the Treasurer of State, who shall credit the fees to the Health Department Drug Precursor Cash Fund.

(iii) The fund shall be administered by the Division of Pharmacy Services and Drug Control of the Department of Health.

(2) Any person that manufactures, possesses, transfers, or transports any drug precursor or that proposes to engage in the manufacture, possession, transfer, or transportation of any drug precursor shall annually obtain a license issued by the Department of Health.

(3) A person licensed by the Department of Health to manufacture, possess, transfer, or transport a drug precursor may manufacture, possess, transfer, or transport the drug precursor to the extent authorized by the person's license and in conformity with any other provision of law.

(4) The following persons are not required to be licensed under this subsection and may lawfully possess a drug precursor:

(A) A physician, dentist, pharmacist, veterinarian, or podiatrist;

(B) An agent of any manufacturer, or wholesaler of any drug precursor if the agent is acting in the usual course of his or her principal's business or employment;

(C) An employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business;

(D) A student enrolled in a college chemistry class for credit if the student's use of the drug precursor is for a bona fide educational purpose and the educational institution otherwise possesses all the necessary licenses required by the Department of Health;

(E) An officer or employee of an appropriate agency of federal, state, or local government and a law enforcement agency acting pursuant to its official duties; and

(F) Any researcher, including an analytical laboratory, experimenting with, studying, or testing any drug analog that is licensed by the Department of Health pursuant to the requirements of this subsection.

(d) **WAIVER.** The Department of Health may waive by regulation the requirement for licensing of certain manufacturers if the waiver is consistent with the public health and safety.

(e) **ISSUANCE OF LICENSE — FEES.**

(1)(A) The Department of Health shall license an applicant to manufacture, possess, transfer, or transport a drug precursor unless



it determines that the issuance of the license would be inconsistent with the public interest.

(B) In determining the public interest, the Department of Health shall consider the following factors:

(i) Maintenance of effective controls against diversion of a drug precursor other than a legitimate medical, scientific, or industrial channel;

(ii) Compliance with applicable state and local law;

(iii) Any conviction of the applicant under federal or state law relating to any controlled substance or drug precursor;

(iv) Past experience in the manufacture, possession, transfer, or transportation of a drug precursor and the existence in the applicant's establishment of effective controls against diversion;

(v) Furnishing by the applicant of false or fraudulent material in any application filed under subsection (c) of this section;

(vi) Suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense a controlled substance or drug precursor authorized by federal law; and

(vii) Any other factor relevant to and consistent with the public health and safety.

(2) Licensing under this section does not entitle a licensee to manufacture, possess, transfer, or transport a drug precursor other than a drug precursor allowed in the license.

(f) DENIAL, REVOCATION, OR SUSPENSION OF LICENSE.

(1) The Department of Health may deny, revoke, or suspend a license issued pursuant to subsection (c) of this section for any of the following reasons:

(A) If a licensee is convicted of, or has accepted by a court a plea of guilty or nolo contendere to a felony under any state or federal law relating to a controlled substance or a drug precursor;

(B)(i) If a licensee has its federal registration to manufacture, conduct research on, distribute, or dispense a controlled substance or a drug precursor suspended or revoked.

(ii) The Department of Health may limit revocation or suspension of a license to the particular controlled substance or drug precursor that was the basis for revocation or suspension; or

(C) If a licensee commits an unlawful act as enumerated in subsection (g) of this section.

(2)(A)(i) When the Department of Health suspends or revokes a license, any controlled substance or drug precursor owned or possessed by the licensee at the time of the suspension or on the effective date of the revocation order may be placed under seal.

(ii) No disposition may be made of a controlled substance or drug precursor under seal until the time for making an appeal has elapsed or until all appeals have been concluded unless a court orders otherwise or orders the sale of any perishable controlled substance or drug precursor and the deposit of the proceeds with the court.

(B) Upon a revocation order becoming final:

(i) Any controlled substance and any drug precursor may be forfeited to the Department of Health;

(ii) Any expense of disposing of a forfeited controlled substance or drug precursor shall be borne by the licensee;

(iii) The court may order the licensee to pay a reasonable sum of money to the Department of Health to cover the expenses of disposition; and

(iv) The Department of Health may seek enforcement of the order of payment, or reimbursement for any expenses through any lawful means.

(g) UNLAWFUL ACTS — LICENSES — PENALTIES.

(1) It is unlawful to:

(A) Knowingly transfer a drug precursor except to an authorized licensee;

(B) Knowingly use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended, or issued to another person;

(C) Knowingly acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception, or subterfuge;

(D) Knowingly furnish false or fraudulent material information in, or omitting any material information from, any application, report, or other document required to be kept or filed under this section or any record required to be kept by this section;

(E) Have knowledge of the manufacture of a drug precursor not authorized by a licensee's license, or have knowledge of the transfer of a drug precursor not authorized by the licensee's license to another licensee or authorized person;

(F) Refuse entry into any premises for any inspection authorized by this section; or

(G) Manufacture, possess, transfer, or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the Department of Health.

(2) Any person who violates a provision of this subsection is guilty of a Class D felony.

(h) RECORDS TO BE KEPT — ORDER FORMS.

(1) A manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes any drug precursor to a person shall make an accurate and legible record of the transaction and maintain the record for a period of at least two (2) years after the date of the transaction.

(2) Before selling, transferring, or otherwise furnishing to a person in this state a precursor substance subject to subdivision (h)(1) of this section, a manufacturer, wholesaler, retailer, or other person shall:

(A) If the recipient does not represent a business, obtain from the recipient:

(i) The recipient's driver's license number or other personal identification certificate number, date of birth, and residential or mailing

address, other than a post office box number, from a driver's license or personal identification card issued by the Department of Finance and Administration that contains a photograph of the recipient;

(ii) The year, state, and number of the motor vehicle license of the motor vehicle owned or operated by the recipient;

(iii) A complete description of how the substance is to be used; and

(iv) The recipient's signature;

(B) If the recipient represents a business, obtain from the recipient:

(i) A letter of authorization from the business that includes the business license or comptroller tax identification number, address, area code, and telephone number, and a complete description of how the precursor substance is to be used; and

(ii) The recipient's signature; and

(C) For any recipient, sign as a witness to the signature and identification of the recipient.

(3)(A) Except as otherwise provided in this section, a manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes to a person in this state a drug precursor shall submit to the Department of Health, at least twenty-one (21) days before the delivery of the drug precursor, a report of the transaction on a form obtained from the Department of Health that includes the information required by subdivision (h)(2)(A) or subdivision (h)(2)(B) of this section.

(B) A copy of this report shall be transmitted to the Department of Arkansas State Police.

(i) REPORTS OF THEFT, LOSS, SHIPPING DISCREPANCIES, AND OTHER TRANSACTIONS.

(1) The theft or loss of any drug precursor discovered by any person regulated by this section shall be reported to the Department of Health and the Department of Arkansas State Police within three (3) days after the discovery.

(2)(A) Any difference between the quantity of any drug precursor received and the quantity shipped shall be reported to the Department of Health within three (3) days after the receipt of actual knowledge of the discrepancy.

(B) When applicable, any report made pursuant to this subsection shall also include the name of any common carrier or person that transported the substance and the date of shipment of the substance.

(3) Any manufacturer, wholesaler, retailer, or other person subject to any other reporting requirement in this section that receives from a source outside of this state any drug precursor specified in rules and regulations promulgated pursuant to this section shall submit a report of the transaction to the Department of Health in accordance with rules adopted by the Department of Health.

(4) Any person violating any provision of this subsection is guilty of a Class A misdemeanor.

(5) The Department of Health may authorize a manufacturer, wholesaler, retailer, or other person to submit a comprehensive monthly



report instead of the report required by subdivision (i)(2)(A) of this section if the Director of the Department of Health determines that:

(A) There is a pattern of regular supply and purchase of the drug precursor between the furnisher and the recipient; or

(B) The recipient has established a record of utilization of the drug precursor solely for a lawful purpose.

(j) INVESTIGATIONS AND INSPECTIONS.

(1) The Department of Arkansas State Police specifically may investigate any violation of a provision of this section, and enforce its provisions.

(2) Further, the Department of Arkansas State Police and the Department of Health shall exchange information gathered or received by either agency under the provisions of this section.

(3) Any record kept by a licensee pursuant to this section is open to inspection by an authorized investigator of the Department of Arkansas State Police or the Department of Health during normal business hours and at any other reasonable time.

(k) In addition to rules and regulations authorized by a provision of this section, the Department of Health may promulgate necessary rules and regulations to carry out the provisions of this section.

**History.** Acts 1991, No. 954, §§ 1, 3, 4; 2007, No. 827, §§ 63, 64.

**A.C.R.C. Notes.** As enacted by Acts 1991, No. 954, § 1, subdivision (i)(3)

began: "On or after the effective date of this act." The effective date of Acts 1991, No. 954, was July 15, 1991.

## 5-64-416. [Repealed.]

**Publisher's Notes.** This section, concerning assessment of fee upon conviction or probation, was repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995

(1st Ex. Sess.), No. 13, § 4. The section was derived from Acts 1991, No. 1061, § 1.

## 5-64-417. Penalties under other laws.

Any penalty imposed for a violation of this chapter is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law.

**History.** Acts 1991, No. 1145, §§ 1, 2; 2005, No. 1994, § 307.

## 5-64-418. Foreign conviction.

If a violation of this chapter is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

**History.** Acts 2001, No. 1141, § 1; 2005, No. 1994, § 307.

**Cross References.** Affirmative defense — Former prosecution in another

jurisdiction, § 5-1-114.

**5-64-419. Possession of a controlled substance.**

(a) Except as provided by this chapter, it is unlawful for a person to possess a controlled substance.

(b) A person who violates this section with respect to:

(1) A Schedule I or Schedule II controlled substance that is methamphetamine or cocaine with an aggregate weight, including an adulterant or diluent, of:

(A) Less than two grams (2g) upon conviction is guilty of a Class D felony;

(B) Two grams (2g) or more but less than ten grams (10g) upon conviction is guilty of a Class C felony; or

(C) Ten grams (10g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class B felony;

(2) A Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine with an aggregate weight, including an adulterant or diluent, of:

(A) Less than two grams (2g) upon conviction is guilty of a Class D felony;

(B) Two grams (2g) or more but less than twenty-eight grams (28g) upon conviction is guilty of a Class C felony; or

(C) Twenty-eight grams (28g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class B felony;

(3) A Schedule III controlled substance with an aggregate weight, including an adulterant or diluent, of:

(A)(i) Less than two grams (2g) upon conviction is guilty of a Class A misdemeanor.

(ii) However, if the person has four (4) or more prior convictions under this section or the former § 5-64-401(c), upon conviction the person is guilty of a Class D felony for a violation of subdivision (b)(3)(A)(i) of this section;

(B) Two grams (2g) or more but less than twenty-eight grams (28g) upon conviction is guilty of a Class D felony;

(C) Twenty-eight grams (28g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class C felony; or

(D) Two hundred grams (200g) or more but less than four hundred grams (400g) upon conviction is guilty of a Class B felony;

(4) A Schedule IV or Schedule V controlled substance with an aggregate weight, including an adulterant or diluent, of:

(A)(i) Less than twenty-eight grams (28g) upon conviction is guilty of a Class A misdemeanor.

(ii) However, if the person has four (4) or more prior convictions under this section or the former § 5-64-401(c), upon conviction the person is guilty of a Class D felony for a violation of subdivision (b)(4)(A)(i) of this section;

(B) Twenty-eight grams (28g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class D felony;

(C) Two hundred grams (200g) or more but less than four hundred grams (400g) upon conviction is guilty of a Class C felony; or

(D) Four hundred grams (400g) or more but less than eight hundred grams (800g) upon conviction is guilty of a Class B felony; or

(5) A Schedule VI controlled substance with an aggregate weight, including an adulterant or diluent, of:

(A) Less than four ounces (4 oz.) upon conviction is guilty of a Class A misdemeanor;

(B) One ounce (1 oz.) or more but less than four ounces (4 oz.) and the person has four (4) previous convictions under this section or the former § 5-64-401(c) upon conviction is guilty of a Class D felony;

(C) Four ounces (4 oz.) or more but less than ten pounds (10 lbs.) upon conviction is guilty of a Class D felony;

(D) Ten pounds (10 lbs.) or more but less than twenty-five pounds (25 lbs.) upon conviction is guilty of a Class C felony;

(E) Twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) upon conviction is guilty of a Class B felony; or

(F) One hundred pounds (100 lbs.) or more but less than five hundred pounds (500 lbs.) upon conviction is guilty of a Class A felony.

(c) If a person possesses a controlled substance in violation of this section while the person is an inmate in a state criminal detention facility, county criminal detention facility, city criminal detention facility, or juvenile detention facility, the penalty for the offense is increased to the next higher classification as prescribed by law for the offense.

**History.** Acts 2011, No. 570, § 44; 2013, No. 529, § 1.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Amendments.** The 2013 amendment redesignated former (b)(3)(A) as

(b)(3)(A)(i), and added (b)(3)(A)(ii); inserted “grams” preceding “(200g)” in (b)(3)(C); redesignated former (b)(4)(A) as (b)(4)(A)(i), and added (b)(4)(A)(ii); redesignated (b)(5)(i) through (vi) as (b)(5)(A) through (F); and substituted “four (4) previous convictions” for “two (2) previous convictions” in (b)(5)(B).

**Cross References.** Joshua Ashley-Pauley Act, § 20-13-1701 et seq.

## RESEARCH REFERENCES

**ALR.** What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Marijuana Offenses Under 8 U.S.C. § 1101(a)(43)(B). 76 A.L.R. Fed. 2d 1.

What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C.

§ 1227(a)(2)(A)(iii)) — Cocaine and Crack Cocaine Offenses Under 8 U.S.C. § 1101(a)(43)(B). 76 A.L.R. Fed. 2d 61.

What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Heroin Offenses Under 8 U.S.C. § 1101(a)(43)(B). 78 A.L.R. Fed. 2d 133.

What Constitutes “Aggravated Felony”



for Which Aliens Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Illicit Methamphetamine Offenses Under 8 U.S.C. § 1101(a)(43)(B). 78 A.L.R. Fed. 2d 151.

What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C.

§ 1227(a)(2)(A)(iii)) — Miscellaneous or Unspecified Narcotics Offenses Under 8 U.S.C. § 1101(a)(43)(B). 79 A.L.R. Fed. 2d 335.

**Ark. L. Rev.** Mason L. Boling, Legislative Note: That Was the Easy Part: The Development of Arkansas’s Public Safety Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact, 66 Ark. L. Rev. 1109 (2013).

## CASE NOTES

### ANALYSIS

Defenses.

Evidence.

Evidence Sufficient.

Marijuana.

Possession.

Search.

Usable Amounts.

### Defenses.

Instruction that defendant was not relieved of criminal responsibility for the possession of controlled substances simply because he was intoxicated at the time the contraband was found in his possession held appropriate since the jury could find that the defendant was not in possession of the controlled substances and was, because of his intoxication, unaware of the presence of the substances. *Baughman v. State*, 265 Ark. 869, 582 S.W.2d 4 (1979) (decision under prior law).

### Evidence.

Where controlled substances were unavailable at time of trial as they had apparently been destroyed by those having custody of them but the officers testified in detail about the finding of such contraband, failure to present the drugs physically goes only to the weight of the proof presented by the state. *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980) (decision under prior law).

### Evidence Sufficient.

There was sufficient evidence to support a conviction of possession of a controlled substance, methamphetamine, where defendant was driving a truck containing a large amount of pseudoephedrine pills in plain sight, her purse was in plain sight, methamphetamine was found inside of a flashlight in her purse, and she told an

officer that she forgot that she left drugs in the flashlight. Constructive possession was established. *Champlin v. State*, 98 Ark. App. 305, 254 S.W.3d 780 (2007) (decision under prior law).

### Marijuana.

When marijuana is weighed the stalks are excluded, but the stems and seeds are included. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995) (decided under former § 5-64-401).

### Possession.

Evidence held to be sufficient circumstances for jury to draw reasonably the conclusion that the defendant had joint possession of the substance even though that possession might have been constructive. *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976) (decision under prior law).

Evidence held sufficient to find that it was error for the trial court not to instruct the jury on the lesser misdemeanor charge of possession of controlled substance at defendant’s prosecution for possession with intent to deliver controlled substance. *Milburn v. State*, 260 Ark. 553, 542 S.W.2d 490 (1976) (decision under prior law).

Evidence held sufficient to support a conviction for possession of controlled substance. *Newberry v. State*, 261 Ark. 648, 551 S.W.2d 199 (1977); *Wade v. State*, 267 Ark. 1101, 594 S.W.2d 43 (Ct. App. 1980); *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980); *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987); *Johnson v. State*, 23 Ark. App. 200, 745 S.W.2d 651 (1988); *Nowden v. State*, 31 Ark. App. 266, 792 S.W.2d 621 (1990); *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993) (decision under prior law).

It cannot be inferred that one in nonexclusive possession of premises knew of the

presence of drugs and had joint control of them unless there were other factors from which the jury can reasonably infer the accused had joint possession and control. *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978) (decision under prior law).

Evidence held insufficient to support conviction for possession of a controlled substance. *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978) (decision under prior law).

Joint occupancy of premises alone will not be sufficient to establish possession or joint possession unless there are additional factors from which the jury can infer possession. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982) (decision under prior law).

There are two separate problems involved in establishing the defendant's "exclusive control" of the premises in order to impute possession; the first is whether the accused is a sole or joint occupant, and the second is, if the accused is the sole occupant, does he have actual exclusive control of the premises. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982) (decision under prior law).

Possession need not be actual, physical possession, but may be constructive, when one controls a substance or has the right to control it; constructive possession can be implied when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control, or to the joint control of the accused and another, but neither actual nor exclusive possession of the contraband is necessary to sustain a charge of possession. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982) (decision under prior law).

Evidence held sufficient to enable the jury to infer constructive possession on the part of the defendants. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985) (decision under prior law).

Where the defendant obtained the controlled substance pursuant to a prescription, his possession was lawful even though the defendant failed to use the prescription as directed. *Wilson v. State*, 290 Ark. 397, 720 S.W.2d 292 (1986) (decision under prior law).

Possession excludes a passing control, fleeting and shadowy in nature; however, this exclusion does not insulate from pros-

ecution those who seek to dispose of contraband upon discovering that the police are approaching. *Turner v. State*, 24 Ark. App. 102, 749 S.W.2d 339 (1988) (decision under prior law).

Evidence held sufficient to support conviction for possession of controlled substance and for possession of paraphernalia. *Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990) (decision under prior law).

Evidence of possession with intent to deliver a controlled substance (marijuana) and possession with intent to use drug paraphernalia held sufficient. *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994) (decided under former § 5-64-401).

Evidence was sufficient to establish constructive possession of marijuana where (1) the defendant was a passenger in his friend's car when the vehicle was stopped by a trooper, and (2) although marijuana found in the car was not in plain view nor on the defendant's person, the officer smelled a strong odor of marijuana emanating from the vehicle as he approached. *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999) (decided under former § 5-64-401).

Evidence was insufficient to establish constructive possession of cocaine where (1) the defendant was a rear-seat passenger in his friend's car when the vehicle was stopped by a trooper, (2) the cocaine was not in plain view, was not under the defendant's exclusive control, and was not found near the seat in which he was seated, (3) there was no testimony that the defendant acted suspiciously, and there was no evidence of any contraband found on his person, and (4) there was testimony that the defendant did not know that there was cocaine in the car until after the police searched the vehicle. *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999) (decided under former § 5-64-401).

Defendant's conviction for possessing at least four ounces but less than 10 pounds of marijuana, in violation of subdivision (b)(5) of this section, was proper because there was sufficient evidence that defendant constructively possessed the marijuana; the marijuana was near defendant when officers raided the house, he told a detective that he lived in the house, and he had some mail in the house. *Duggar v.*



State, 2013 Ark. App. 135, 427 S.W.3d 77 (2013).

Informant's testimony, in addition to defendant's admitting to multiple convictions for drug-related crimes, when paired with the fact that the white powdery substance returned to the officer by the informant was cocaine, were of sufficient force to compel the jury's conclusion that defendant possessed the cocaine. *Matlock v. State*, 2015 Ark. App. 65, 454 S.W.3d 776 (2015).

Verdict finding defendant guilty of possession of a controlled substance schedule I or II not meth/cocaine and possession of a controlled substance schedule VI was supported by sufficient evidence. A forensic chemist testified that the substance he tested was a partial pill that weighed 0.0824 grams and tested positive for morphine after he crushed it. *Foster v. State*, 2015 Ark. App. 412, 467 S.W.3d 176 (2015).

Defense counsel made the motion that the State had not proven that defendant was in possession of the cocaine, and by addressing the specific deficiency of proof required to support the circuit court's ruling, in this case possession, defense counsel's motion was made with enough detail to preserve the motion to dismiss. *Clark v. State*, 2015 Ark. App. 679, 477 S.W.3d 544 (2015).

Evidence supported the State's assertion that the cocaine was found in a place immediately and exclusively accessible to defendant and was subject to his control, as the container with the cocaine was found clearly visible in the passenger seat of defendant's car, and he was alone. Although defendant claimed he had no knowledge of the container and that another person had been a passenger, the circuit court did not find his testimony to be credible. *Clark v. State*, 2015 Ark. App. 679, 477 S.W.3d 544 (2015).

#### **Search.**

Stop was not justified where there was no testimony that the officer was investigating or preventing a crime when she encountered defendant; therefore, the search was illegal and defendant's motion to suppress the evidence of the cocaine and the firearm should have been granted. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000) (decided under former § 5-64-401).

In a possession of drug paraphernalia with intent to manufacture and possession of a controlled substance case, the search warrant was valid and the trial court properly denied defendant's motion to suppress the evidence seized from the shared residence where: (1) the distinctive odor of a methamphetamine lab was a valid contributing factor in establishing probable cause for the warrant; (2) the search warrant was supported by more than mere conclusory statements; (3) the initial search of the residence was limited to the common area outside the residence where no warrant was required, and the search inside the residence was pursuant to a search warrant; (4) even if the landlord's statements were completely eliminated, there were still sufficient facts to support probable cause to search the residence; and (5) the partially incorrect address listed in the search warrant did not make the search warrant defective, especially since the affidavit correctly identified the residence and the officer who had obtained the search warrant and had previously been to the residence would later, himself, conduct the search. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003) (decided under former § 5-64-401).

While federal marshals were arresting defendant at his apartment for a violation of probation, the marshals discovered what they suspected to be cocaine in the bathroom and called the city police, who determined that the substance in the bathroom, which was in plain view, was cocaine, however, the city police officers improperly searched a black bag in another room without defendant's consent; thus, if the evidence found in the illegal search of black bag motivated the officers to obtain a search warrant, the illegal search would preclude application of the independent-source doctrine and the evidence would be inadmissible. *Lauderdale v. State*, 82 Ark. App. 474, 120 S.W.3d 106 (2003) (decided under former § 5-64-401).

#### **Usable Amounts.**

Conviction was reversed where defendant was found to be in possession of a bottle which had less than a usable amount of cocaine. *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990) (decided under former § 5-64-401).

It was proper to allow both a narcotics officer and a chemist with the state crime



lab to testify that, in their opinion, .01 grams of crack cocaine was a usable amount. *Terrell v. State*, 35 Ark. App. 185, 818 S.W.2d 579 (1991) (decided under former § 5-64-401).

The trial court did not err in refusing to instruct the jury that for a quantity of drugs to constitute a usable amount it must be sufficient “to have an effect on the human system”. *Terrell v. State*, 35 Ark. App. 185, 818 S.W.2d 579 (1991) (decided under former § 5-64-401).

Conviction for possessing a “usable amount” of cocaine was upheld, even though chemist could not testify as to the effect of twelve milligrams on the human body, but could testify that he had seen pieces of crack cocaine of that size loaded into a pipe. *Buckley v. State*, 36 Ark. App. 7, 816 S.W.2d 894 (1991) (decided under former § 5-64-401).

Evidence was sufficient for the fact finder to determine that the substance was of a measurable amount where the cocaine was capable of quantitative analysis, could be seen with the naked eye, was tangible and could be picked up. *Sinks v.*

*State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993) (decided under former § 5-64-401).

Although there was no evidence as to the weight of the phencyclidine (PCP), there was substantial evidence to support the finding that a usable amount was detected on a marijuana cigarette that had been dipped in PCP. *Williams v. State*, 47 Ark. App. 143, 887 S.W.2d 312 (1994) (decided under former § 5-64-401).

Defendant’s conviction for possession of methamphetamine was reversed because the state offered no evidence that a usable amount of the contraband existed; the amount of residue on the plastic bags could not be weighed. *Porter v. State*, 99 Ark. App. 137, 257 S.W.3d 919 (2007) (decided under former § 5-64-401).

*Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), means what it holds; possession of a container with a trace amount or residue of contraband that is neither measurable nor usable is not possession of a controlled substance under this section. *Porter v. State*, 99 Ark. App. 137, 257 S.W.3d 919 (2007) (decided under former § 5-64-401).

### **5-64-420. Possession of methamphetamine or cocaine with the purpose to deliver.**

(a) Except as provided by this chapter, it is unlawful if a person possesses methamphetamine or cocaine with the purpose to deliver the methamphetamine or cocaine. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package methamphetamine or cocaine;

(2) The person possesses a record indicating a drug-related transaction;

(3) The methamphetamine or cocaine is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of methamphetamine or cocaine;

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person’s purpose was to deliver methamphetamine or cocaine.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person possessed less than two grams (2g) of methamphetamine or cocaine by aggregate weight, including an adulterant or diluent;

(2) Class B felony if the person possessed two grams (2g) or more but less than ten grams (10g) of methamphetamine or cocaine by aggregate weight, including an adulterant or diluent; or

(3) Class A felony if the person possessed ten grams (10g) or more but less than two hundred grams (200g) of methamphetamine or cocaine by aggregate weight, including an adulterant or diluent.

**History.** Acts 2011, No. 570, § 45.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs."

## RESEARCH REFERENCES

**ALR.** What Constitutes "Aggravated Felony" for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Cocaine and Crack Cocaine Offenses Under 8 U.S.C. § 1101(a)(43)(B). 76 A.L.R. Fed. 2d 61.

What Constitutes "Aggravated Felony" for Which Aliens Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Illicit Methamphetamine Offenses Under 8 U.S.C. § 1101(a)(43)(B). 78 A.L.R. Fed. 2d 151.

## CASE NOTES

### ANALYSIS

Competency.  
Double Jeopardy.  
Evidence.  
Evidence Insufficient.  
Evidence Sufficient.  
Informers.  
Lesser-Included Offenses.  
Possession.  
Sentencing.  
Suppression of Evidence.

### Competency.

Where defendant, who had tried to commit suicide while in custody, appealed his convictions for violating this section and § 5-64-443(c), the circuit court did not err by denying his motion for a psychological evaluation. Defendant's mere statement that he was depressed was not enough to give the circuit court reason to believe that mental disease or defect would be an issue or to give the circuit court reason to doubt his fitness to proceed. *King v. State*, 2014 Ark. App. 81, 432 S.W.3d 127 (2014).

### Double Jeopardy.

There was no double jeopardy violation where defendant was sentenced for both possession with intent to deliver a controlled substance and simultaneous possession of drugs and firearms under § 5-

74-106; the legislature made it clear that it wished to assess an additional penalty for simultaneously possessing drugs and a firearm. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000) (decided under former § 5-64-401).

### Evidence.

Evidence of subsequent drug sales was properly admitted at defendant's trial for possession of cocaine with the intent to deliver and possession of methamphetamine with the intent to deliver; pursuant to Ark. R. Evid. 404(b) and 403, the evidence was relevant to whether defendant intended to deliver the drugs, and was not unfairly prejudicial. *Turner v. State*, 2009 Ark. App. 822 (2009) (decision under prior law).

### Evidence Insufficient.

Evidence was not sufficient to convict defendant of possession with intent to deliver cocaine found in a vehicle registered to his brother. Although cocaine was found on both sides of the vehicle, it was sufficiently well hidden that defendant would not have been aware of its presence simply by riding in or driving the vehicle; there was no evidence he had been in or around the vehicle before a trip with his brother; and the only evidence of nervousness was that he did not make eye contact



with the officer. *Bustillos v. State*, 2012 Ark. App. 654, 425 S.W.3d 44 (2012), cert. denied, — U.S. —, 134 S. Ct. 74, 187 L. Ed. 2d 57 (2013).

### **Evidence Sufficient.**

Trial court did not err in denying defendant's motion for a directed verdict because there was substantial evidence to support defendant's conviction for possession of cocaine with intent to deliver; defendant had three cellular telephones attached to defendant's belt and digital scales were found in the glove compartment of defendant's vehicle. *Dishman v. State*, 2011 Ark. App. 437, 384 S.W.3d 590 (2011) (decided under former § 5-64-401).

Evidence was sufficient to convict defendant of possession with intent to deliver cocaine found in a vehicle registered to him and covered by an insurance policy that only lasted 30 days. The cocaine was found in a location that would take time and effort to access and was hidden in a manner that would not have been possible for a transient passenger; also, defendant appeared nervous during the stop. *Bustillos v. State*, 2012 Ark. App. 654, 425 S.W.3d 44 (2012), cert. denied, — U.S. —, 134 S. Ct. 74, 187 L. Ed. 2d 57 (2013).

Where a defendant appealed his conviction for possession of methamphetamine with the purpose to deliver, he unsuccessfully argued that there was insufficient evidence to support the conviction. Four out of the five statutory factors indicating a purpose to deliver methamphetamine were present in the case. *King v. State*, 2014 Ark. App. 81, 432 S.W.3d 127 (2014).

### **Informers.**

Where the informant was not present when the search was made, nor was the defendant charged with a sale that the informant witnessed, the defendant did not need to know the name of the confidential informant to prepare his defense. *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986) (decision under prior law).

### **Lesser-Included Offenses.**

While there was not substantial evidence to support defendant's conviction for possession of methamphetamine with intent to deliver, there was clearly substantial evidence to support a conviction for the lesser-included offense of possession of methamphetamine, given that defendant admitted to possession of the

small quantity seized from the kitchen table; where the evidence was insufficient to sustain a conviction for a certain crime, but where there was sufficient evidence to sustain a conviction for a lesser-included offense, the appellate court could resentence the defendant or remand the case to the trial court for resentencing. *Cooper v. State*, 84 Ark. App. 342, 141 S.W.3d 7 (2004) (decision under prior law).

### **Possession.**

Joint occupancy of premises alone will not be sufficient to establish possession or joint possession unless there are additional factors from which the jury can infer possession. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982) (decision under prior law).

There are two separate problems involved in establishing the defendant's "exclusive control" of the premises in order to impute possession; the first is whether the accused is a sole or joint occupant, and the second is, if the accused is the sole occupant, does he have actual exclusive control of the premises. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982) (decision under prior law).

Possession need not be actual, physical possession, but may be constructive, when one controls a substance or has the right to control it; constructive possession can be implied when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control, or to the joint control of the accused and another, but neither actual nor exclusive possession of the contraband is necessary to sustain a charge of possession. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982) (decision under prior law).

Possession may be constructive when one controls a substance or has the right to control it; actual physical possession at the time of the arrest is not required. *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986) (decision under prior law).

Where contraband is discovered in jointly occupied premises, and there is no direct evidence that it belongs to a particular occupant, some additional factor must be present linking the accused to the contraband. The state must prove that the accused exercised care, control and management over the contraband. *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990) (decision under prior law).



Evidence held sufficient to support a conviction for possession of controlled substance with intent to deliver. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991) (decision under prior law).

The state need not prove that the accused had actual possession of a controlled substance; constructive possession is sufficient. Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991) (decision under prior law).

Neither exclusive nor physical possession is necessary to sustain a charge if the place where the offending substance is found is under the dominion and control of the accused. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991) (decision under prior law).

Substantial evidence of constructive possession existed where abundant amounts of contraband lay in front of the defendant, in plain view, on the table, in his house when the police arrived. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991) (decision under prior law).

Joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993) (decision under prior law).

In order to prove a defendant is in possession of a controlled substance, constructive possession is sufficient; neither exclusive nor actual, physical possession of a controlled substance is necessary to sustain a charge. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995) (decided under former § 5-64-401).

Among the "linking" factors this court has considered in cases involving vehicles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with accused's personal effects; (3) whether the contraband is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; (5) whether the accused acted suspiciously before or during the arrest. Courts have also considered the improbability that anyone other than the occupants of the

vehicle placed the contraband in the vehicle; and the improbable nature of the accused's explanation for his journey. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995) (decided under former § 5-64-401).

Evidence of possession held sufficient, even though parcel delivery service package was addressed to defendant's son, where defendant's activity in attempting to retrieve the package from the delivery service office supported the inference that defendant knew what the package contained. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996) (decided under former § 5-64-401).

Evidence of possession held sufficient where the drugs and the defendant were both in a garage and the drug container was on the floor three feet from the defendant. *Darrough v. State*, 330 Ark. 808, 957 S.W.2d 707 (1997) (decided under former § 5-64-401).

Where contraband is discovered in jointly occupied premises and there is no direct evidence that it belongs to a particular occupant, some additional factors must be present linking the accused to the contraband; the state must prove that the accused exercised care, control and management over the contraband. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003) (decided under former § 5-64-401).

During a random inspection of his truck, where defendant gave police officer the key to his trailer and consented to the search of his truck, evidence was sufficient to show that defendant constructively possessed 334.4 pounds of marijuana found in duffel bags and 4.26 pounds of cocaine found in the trailer; although there was a passenger in the cab, defendant had the only key to the locked trailer. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005) (decided under former § 5-64-401).

Sufficient evidence existed to convict defendant of possession of cocaine and marijuana with intent to deliver where (1) defendant exercised dominion over the car that he was driving, (2) the smell of marijuana from the trunk was so strong that, when the trunk was opened, defendant would have known it was there, and (3) there was a strong inference that the clothes in the trunk belonged to defendant. *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005), cert. denied, 547 U.S.

1102, 126 S. Ct. 1890, 164 L. Ed. 2d 575 (2006) (decision under prior law).

Trial court properly denied defendant's motion for directed verdict where substantial evidence existed to support a conclusion that defendant had the intent to possess and deliver 520 grams of cocaine rather than the 12.7914 that he actually possessed and, thus, the jury properly sentenced defendant. *Strong v. State*, 368 Ark. 23, 242 S.W.3d 620 (2006) (decided under former § 5-64-401).

Trial court did not err in denying defendant's motion for a directed verdict where there was sufficient evidence under the constructive-possession inquiry to link defendant to the contraband, crack cocaine, under the driver's seat and in the back seat of a vehicle; the vehicle was not only registered in defendant's name, but defendant also insured it. Hence, defendant was properly convicted of possession of a controlled substance with intent to deliver. *Tubbs v. State*, 370 Ark. 47, 257 S.W.3d 47 (2007) (decision under prior law).

Evidence was sufficient to sustain a conviction for possession of methamphetamine with intent to deliver because when defendant left the residence, the bed of the truck was empty, but when he returned, the bed of the truck was full, and a parole officer testified that she found the coat with methamphetamine in defendant's truck in defendant's backyard. As the state points out, when the truck was searched, it was immediately and exclusively accessible to defendant, and he was in close proximity to the methamphetamine. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007) (decided under former § 5-64-401).

Sufficient evidence supported a perpetrator's conviction of possession of controlled substances with the intent to deliver because the perpetrator's perfectly timed flight when officers pried open a false compartment in the vehicle in which the perpetrator was occupant was sufficiently compelling to show that he knew drugs were hidden in false compartment, and established possession. *Benitez v.*

*State*, 99 Ark. App. 140, 257 S.W.3d 902 (2007) (decision under prior law).

Defendant was properly found guilty of possession of cocaine with the intent to deliver and possession of methamphetamine with the intent to deliver because there was substantial evidence that defendant, who continued to live at the residence at the time it was searched, was in constructive possession of the contraband found, and an informant testified that he made three controlled drug buys from defendant at the residence. *Turner v. State*, 2009 Ark. App. 822 (2009) (decision under prior law).

### **Sentencing.**

Failure of the State to plead a specific amount of cocaine alleged to have been possessed did not limit the sentence that defendant could receive to the minimum allowed. *Bustillos v. State*, 2012 Ark. App. 654, 425 S.W.3d 44 (2012), cert. denied, — U.S. —, 134 S. Ct. 74, 187 L. Ed. 2d 57 (2013).

### **Suppression of Evidence.**

Contact between defendant and an officer was the result of an investigation into drug-related criminal activity, not a routine traffic stop, because the officer blocked the vehicle in the driveway, demanded that defendant move to the back of the vehicle, informed her that he knew there were drugs in the vehicle, and asked where they were located. Defendant's pre-Miranda statement should have been suppressed. *James v. State*, 2012 Ark. App. 118, 390 S.W.3d 95 (2012).

Where defendant appealed his convictions for violating this section and § 5-64-443(c), circuit court's decision to deny his motion to suppress the evidence was not clearly against the preponderance of the evidence. Because he met the officers on his front porch with a rifle, an officer reasonably detained and frisked him to ensure the officers' safety, and the contraband was discovered when, after the valid frisk, defendant voluntarily pulled the contraband out of his pocket and showed it to the officer. *King v. State*, 2014 Ark. App. 81, 432 S.W.3d 127 (2014).

**5-64-421. [Reserved.]**

**5-64-422. Delivery of methamphetamine or cocaine.**

(a) Except as provided by this chapter, it is unlawful for a person to deliver methamphetamine or cocaine.

(b)(1) A person who delivers less than two grams (2g) by aggregate weight, including an adulterant or diluent, of methamphetamine or cocaine upon conviction is guilty of a Class C felony.

(2) A person who delivers two grams (2g) or more but less than ten grams (10g) by aggregate weight, including an adulterant or diluent, of methamphetamine or cocaine upon conviction is guilty of a Class B felony.

(3) A person who delivers ten grams (10g) or more but less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of methamphetamine or cocaine upon conviction is guilty of a Class Y felony.

**History.** Acts 2011, No. 570, § 46.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**RESEARCH REFERENCES**

**ALR.** What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Cocaine and Crack Cocaine Offenses Under 8 U.S.C. § 1101(a)(43)(B). 76 A.L.R. Fed. 2d 61.

What Constitutes “Aggravated Felony” for Which Aliens Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Illicit Methamphetamine Offenses Under 8 U.S.C. § 1101(a)(43)(B). 78 A.L.R. Fed. 2d 151.

**CASE NOTES**

**ANALYSIS**

Constitutionality.

Cocaine.

Delivery.

—In General.

Evidence.

Evidence Sufficient.

Informant.

Participants to Transactions.

**Constitutionality.**

The imposition of sentence of life imprisonment for delivery of less than one-quarter gram of cocaine base, which was the defendant’s first offense, constituted cruel and unusual punishment under the

Eighth Amendment to the federal constitution. *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001) (decided under former § 5-64-401).

**Cocaine.**

Cocaine is a Schedule II controlled substance. *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986) (decision under prior law).

It is unnecessary for the state to offer evidence to the trial court, sitting without a jury, that cocaine is listed by the health department as a Schedule II controlled substance or that cocaine is classified by the legislature as a narcotic drug. *Lively v. State*, 25 Ark. App. 198, 755 S.W.2d 238 (1988) (decision under prior law).



**Delivery.****—In General.**

Evidence held sufficient to sustain conviction for delivery of controlled substance. *Womack v. State*, 301 Ark. 193, 783 S.W.2d 33 (1990); *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990) (decisions under prior law).

Although a third person ultimately took the money, defendant could be guilty of “delivery” of a controlled substance, as one does not have to receive money to be guilty of delivery of a controlled substance. *Higgs v. State*, 313 Ark. 272, 854 S.W.2d 328 (1993) (decided under former § 5-64-401).

**Evidence.**

In a prosecution for delivery of cocaine it was not error for the court to admit evidence of the street value of the cocaine as the prejudicial effect did not outweigh its probative value. *Hoback v. State*, 286 Ark. 153, 689 S.W.2d 569 (1985) (decision under prior law).

Discrepancies in the testimony as to whether the informant’s hands were always clearly visible during the first exchange, whether the cocaine was wrapped in tin foil or white paper, how thoroughly the informant was searched before the first exchange, and whether the second officer saw what the defendant handed to the informant did not make the evidence insufficient for three counts of delivery of controlled substances, as minor discrepancies, conflicts, and inconsistencies are for the jury to assess in weighing the testimony. *Parker v. State*, 290 Ark. 94, 717 S.W.2d 197 (1986) (decision under prior law).

Evidence that defendant sold a quantity of cocaine in exchange for money constituted substantial evidence to sustain conviction for the delivery of a controlled substance and it was not incumbent upon the state in these circumstances to produce evidence of a usable amount. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992) (decision under prior law).

Testimony of prior marijuana use and sale, as reflective of the accused’s predisposition toward committing the crime of delivery of a controlled substance, is generally admissible to rebut the defense of entrapment, and is relevant on a material point in issue. *Kellogg v. State*, 37 Ark.

App. 162, 827 S.W.2d 166 (1992) (decision under prior law).

Defendant’s conviction of delivery of methamphetamine was reversed because the trial court erred by admitting evidence of a prior controlled drug buy under Ark. R. Evid. 404(b) that occurred approximately two weeks before the instant crime; the court could not perceive of any reason for the admission of the prior crime other than to show that defendant was a drug dealer likely to have sold drugs again on the particular date for which he was tried. The record did not show that identity was an issue at trial, and it showed that the controlled buys were fairly routine drug transactions and failed to show a unique methodology; defendant’s intent was not at issue. *Phavixay v. State*, 373 Ark. 168, 282 S.W.3d 795 (2008) (decided under former § 5-64-401).

**Evidence Sufficient.**

Evidence that included identification of defendant by an informant and by three police officers was sufficient to support a jury’s finding that defendant had twice delivered methamphetamine to the confidential informant. The fact that one officer referred to defendant, a black male, as WM, white male, in a police report was explained as a typographical error. *Benjamin v. State*, 102 Ark. App. 309, 285 S.W.3d 264 (2008) (decided under former § 5-64-401).

Where both a detective and a confidential informant testified as to the details of a controlled drug buy, the evidence showed that the informant was given \$250 in marked money, fitted with an audio device, sent to an apartment where he met defendant, and left the apartment with a baggie containing 1.7794 grams of methamphetamine which he gave to the detective. There was substantial evidence of “delivery” within the meaning of subdivision (7) of this section to support defendant’s conviction for delivery of methamphetamine; the district court did not err by denying defendant’s motion for a directed verdict. *Phavixay v. State*, 2009 Ark. 452, 352 S.W.3d 311 (2009) (decided under former § 5-64-401).

Evidence supporting defendant’s convictions for three counts of delivering a controlled substance was substantial because the jury had substantial, if not overwhelming, evidence from which to in-

fer with reasonable certainty from the circumstances that defendant formed the necessary criminal intent to sell a confidential informant crack cocaine; a captain of the police department testified that his office received multiple calls indicating that defendant was engaged in selling controlled substances, and evidence was presented that on three occasions the confidential informant assisted the police in making controlled buys of crack cocaine from defendant and that the substances the confidential informant purchased from defendant tested positive for crack cocaine. *Edwards v. State*, 2010 Ark. App. 59, 377 S.W.3d 271 (2010) (decided under former § 5-64-401).

State produced substantial evidence to support verdict of guilty on three counts of delivery of a controlled substance because the state presented testimony from the officers involved, testimony from an informant, and recordings of the transactions. *Earl v. State*, 2010 Ark. App. 186 (2010) (decided under former § 5-64-401).

#### **Informant.**

Informant and a drug task force officer both testified that the informant was

given cash by the officer, the informant called defendant to set up a purchase, defendant arrived in a car, the informant presented the controlled-drug-buy money to defendant, and was given small off-white rocks that contained a cocaine base. The evidence was sufficient to support defendant's conviction for delivery of cocaine. *Green v. State*, 2009 Ark. App. 589 (2009) (decision under prior law).

#### **Participants to Transactions.**

This section does not require that the perpetrator ultimately receive money, only that he participate in the transfer of the substance in exchange for money or anything of value; the fact that an accused is only the agent of a buyer or seller of drugs does not remove the transfer from the ambit of this section. *Higgs v. State*, 313 Ark. 272, 854 S.W.2d 328 (1993) (decided under former § 5-64-401).

Reverse buys do not constitute entrapment as a matter of law. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000) (decided under former § 5-64-401).

### **5-64-423. Manufacture of methamphetamine — Manufacture of cocaine.**

(a)(1) Except as provided by this chapter, it is unlawful for a person to manufacture methamphetamine.

(2)(A) A person who manufactures methamphetamine in an amount less than two grams (2g) by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class C felony.

(B)(i) A person who manufactures methamphetamine in an amount of two grams (2g) or more by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class Y felony.

(ii)(a) However, a person who manufactures methamphetamine in an amount of two grams (2g) or more by aggregate weight, including an adulterant or diluents, upon conviction is guilty of a Class A felony if the person shows by a preponderance of the evidence that he or she manufactured the methamphetamine for personal use only.

(b) Factors indicative of personal use may include without limitation the:

- (1) Person did not make a delivery of methamphetamine;
- (2) Quantity of methamphetamine manufactured by the person; or
- (3) Method of manufacturing methamphetamine used by the person.

(3) A person who has one (1) or more prior convictions of manufacturing methamphetamine in any amount under this section or the former § 5-64-401 upon conviction is guilty of a Class Y felony.

(b)(1) Except as provided by this chapter, it is unlawful for a person to manufacture cocaine.

(2)(A) A person who manufactures cocaine in an amount less than two grams (2g) by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class C felony.

(B) A person who manufactures cocaine in an amount of two grams (2g) or more but less than ten grams (10g), by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class B felony.

(C) A person who manufactures cocaine in an amount of ten grams (10g) or more but less than two hundred grams (200g), by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class Y felony.

**History.** Acts 2011, No. 570, § 47.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs."

## CASE NOTES

### ANALYSIS

Accomplice Testimony.  
Evidence Sufficient.  
Firearm Possession.  
Lesser-Included Offenses.  
Manufacture.

#### Accomplice Testimony.

Defendant's motion for a directed verdict based on the claim that accomplice testimony was not credible was properly denied where testimony about the agreement between accomplice and defendant to manufacture methamphetamine for sale, and the actual manufacture, was corroborated by the presence of numerous precursor products and substances found in the search of defendant's house; in any event, the question of the accomplice's credibility was for the jury and substantial evidence supported defendant's conviction. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004) (decision under prior law).

#### Evidence Sufficient.

Judgment convicting defendant of manufacturing methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, first-degree endangering the welfare of a minor under § 5-27-205(a)(1), manufacturing methamphetamine in the

presence of a minor, and manufacturing methamphetamine near certain facilities was affirmed because contraband was found in the kitchen and bedroom of defendant's residence, strewn about his yard, and in an outbuilding behind his residence; the materials found in the search were the components of a methamphetamine lab; at least two of defendant's minor children were present in the residence at the time of the search; and the drug paraphernalia and chemicals found could easily be accessed by the children. *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147 (2009) (decided under former § 5-64-401).

#### Firearm Possession.

State did not have to show that defendant physically possessed the handgun in order to sustain a conviction under § 5-74-106 for its possession if the gun's location was such that it was under defendant's dominion and control; the gun in defendant's kitchen next to items used to manufacture methamphetamine sufficiently met that burden. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003) (decided under former § 5-64-401).

#### Lesser-Included Offenses.

Defense counsel was not ineffective for not objecting that defendants' convictions violated double jeopardy under § 5-1-110(b) because possession of drug para-



phernalia with intent to manufacture methamphetamine was not a lesser-included offense of manufacturing methamphetamine. *Myers v. State*, 2012 Ark. 143, 400 S.W.3d 231 (2012) (decided under former § 5-64-401).

Defense counsel was not ineffective for not objecting that defendants' convictions violated double jeopardy because possession of methamphetamine with intent to deliver was not a lesser-included offense of manufacturing methamphetamine. *Myers v. State*, 2012 Ark. 143, 400 S.W.3d 231 (2012) (decided under former § 5-64-401).

#### **Manufacture.**

There was sufficient evidence to support a conviction for manufacturing methamphetamine based on accomplice liability where the evidence showed that drug manufacturing was taking place on defendant's property, defendant admitted knowledge of the operation, and a co-defendant also testified regarding defendant's knowledge of the operation. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004) (decided under former § 5-64-401).

There was substantial evidence to support defendant's conviction for manufacturing methamphetamine because, although there was no HCL generator discovered in the search of defendant's house, a substance identified as methamphetamine oil was found, which was the second-to-last stage in the process of manufacturing methamphetamine; although the manufacturing process was not finished, it had proceeded to all but the final stage, and the components necessary for completion had been assembled. *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115 (2004) (decided under former § 5-64-401).

Evidence was sufficient to sustain a conviction for manufacturing methamphetamine where multiple ingredients and devices used in methamphetamine production were found together with the by-products of such production in defendant's van, as well as actual methamphetamine. *Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006) (decided under former § 5-64-401).

### **5-64-424. Possession of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine with the purpose to deliver.**

(a) Except as provided in this chapter, it is unlawful if a person possesses a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine with the purpose to deliver the Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(2) The person possesses a record indicating a drug-related transaction;

(3) The Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person possessed by aggregate weight, including an adulterant or diluent, less than two grams (2g) of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(2) Class B felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Two grams (2g) or more but less than twenty-eight grams (28g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (b)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units of hydromorphone hydrochloride;

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units of lysergic acid diethylamide (LSD);

(D) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or Schedule II stimulant drug; or

(3) Class A felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more but less than two hundred grams (200g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (b)(3);

(B) One hundred twenty-eight milligrams (128mg) or more or one hundred sixty (160) dosage units or more but less than two hundred grams (200g) of hydromorphone hydrochloride;

(C) One thousand six hundred micrograms (1,600μ) or more or one hundred sixty (160) dosage units or more but less than two hundred grams (200g) of lysergic acid diethylamide (LSD);

(D) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II stimulant drug.

(c) It is a defense to a prosecution under this section that the person possessed less than the minimum listed amount of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine and that is listed in this section.

**History.** Acts 2011, No. 570, § 48.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

### RESEARCH REFERENCES

**ALR.** What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Heroin Offenses Under 8 U.S.C. § 1101(a)(43)(B). 78 A.L.R. Fed. 2d 133.

What Constitutes “Aggravated Felony”

for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Miscellaneous or Unspecified Narcotics Offenses Under 8 U.S.C. § 1101(a)(43)(B). 79 A.L.R. Fed. 2d 335.

### 5-64-425. [Reserved.]

### 5-64-426. Delivery of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine.

(a) This section does not apply to the delivery of methamphetamine or cocaine, which is governed by § 5-64-422.

(b) Except as provided in this chapter, it is unlawful for a person to deliver a Schedule I or Schedule II controlled substance.

(c) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person delivered by aggregate weight, including an adulterant or diluent, less than two grams (2g) of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(2) Class B felony if the person delivered by aggregate weight, including an adulterant or diluent:

(A) Two grams (2g) or more but less than twenty-eight grams (28g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units of hydromorphone hydrochloride;

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units of lysergic acid diethylamide (LSD);

(D) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or Schedule II stimulant drug; or

(3) Class A felony if the person delivered by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more but less than two hundred grams (200g) of a Schedule I or Schedule II controlled substance that



is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(3);

(B) One hundred sixty (160) dosage units or more but less than two hundred grams (200g) of hydromorphone hydrochloride;

(C) One hundred sixty (160) dosage units or more but less than two hundred grams (200g) of lysergic acid diethylamide (LSD);

(D) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II stimulant drug.

**History.** Acts 2011, No. 570, § 49.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

RESEARCH REFERENCES

**ALR.** What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8

U.S.C. § 1227(a)(2)(A)(iii)) — Heroin Offenses Under 8 U.S.C. § 1101(a)(43)(B). 78 A.L.R. Fed. 2d 133.

CASE NOTES

ANALYSIS

Delivery.  
Lesser-Included Offenses.  
Participants to Transactions.

**Delivery.**

Evidence held sufficient to sustain conviction for delivery of controlled substance. *Crain v. State*, 268 Ark. 656, 594 S.W.2d 863 (Ct. App. 1980) (decision under prior law).

**Lesser-Included Offenses.**

Possession of heroin is a lesser-included offense of delivery of heroin. *Glover v. State*, 273 Ark. 376, 619 S.W.2d 629 (1981) (decision under prior law).

**Participants to Transactions.**

Where a narcotics officer had negotiated with defendant about selling him a con-

trolled substance, the officer gave money to defendant’s confederate and the defendant’s accomplice delivered a controlled substance to the officer, evidence was sufficient to show that the defendant was an active participant in the transaction. *Merritt v. State*, 258 Ark. 558, 528 S.W.2d 365 (1975) (decision under prior law).

Where the defendant simply introduced the undercover officers to the sellers of controlled substance from whom the officers bought controlled substance, the defendant was not guilty of delivering controlled substance since he would have had to take a more active part to be a principal or even an accomplice. *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980) (decision under prior law).

**5-64-427. Manufacture of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine.**

(a) This section does not apply to the manufacture of methamphetamine or cocaine, which is governed by § 5-64-423.

(b) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule I or Schedule II controlled substance.

(c) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person manufactured by aggregate weight, including an adulterant or diluent, less than two grams (2g) of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(2) Class B felony if the person manufactured by aggregate weight, including an adulterant or diluent:

(A) Two grams (2g) or more but less than twenty-eight grams (28g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units of hydromorphone hydrochloride;

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units of lysergic acid diethylamide (LSD);

(D) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule I or Schedule II depressant or hallucinogenic drug regardless of weight; or

(E) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule I or Schedule II stimulant drug regardless of weight; or

(3) Class A felony if the person manufactured by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(3);

(B) One hundred sixty (160) dosage units or more of hydromorphone hydrochloride;

(C) One hundred sixty (160) or more dosage units of lysergic acid diethylamide (LSD);

(D) One hundred sixty (160) dosage units or more regardless of weight for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) One hundred sixty (160) dosage units or more regardless of weight for any other Schedule I or Schedule II stimulant drug.

**History.** Acts 2011, No. 570, § 50.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

## RESEARCH REFERENCES

**ALR.** What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8

U.S.C. § 1227(a)(2)(A)(iii)) — Heroin Offenses Under 8 U.S.C. § 1101(a)(43)(B). 78 A.L.R. Fed. 2d 133.

**5-64-428. Possession of a Schedule III controlled substance with the purpose to deliver.**

(a) Except as provided by this chapter, it is unlawful if a person possesses a Schedule III controlled substance with the purpose to deliver the Schedule III controlled substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package a Schedule III controlled substance;

(2) The person possesses a record indicating a drug-related transaction;

(3) The Schedule III controlled substance is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule III controlled substance;

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule III controlled substance.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Less than twenty-eight grams (28g) of a Schedule III controlled substance that is not a controlled substance listed in this subdivision (b)(1);

(B) Less than eighty (80) dosage units for any other Schedule III depressant or hallucinogenic drug; or

(C) Less than eighty (80) dosage units for any other Schedule III stimulant drug;

(2) Class B felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more but less than two hundred grams (200g) of a Schedule III controlled substance that is not a controlled substance listed in this subdivision (b)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule III depressant or hallucinogenic drug; or

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule III stimulant drug; or

(3) Class A felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Two hundred grams (200g) or more but less than four hundred grams (400g) of a Schedule III controlled substance not a controlled substance listed in this subdivision (b)(3);

(B) One hundred sixty (160) dosage units or more for any other Schedule III depressant or hallucinogenic drug; or



(C) One hundred sixty (160) dosage units or more for any other Schedule III stimulant drug.

(c) It is a defense to a prosecution under this section that the person possessed less than the minimum listed amount of a Schedule III controlled substance that is listed in this section.

**History.** Acts 2011, No. 570, § 51; 2013, No. 529, § 2.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offend-

ers accountable, and contain correction costs.”

**Amendments.** The 2013 amendment substituted “Less” for “Forty (40) or more but less” in (b)(1)(B) and (b)(1)(C).

## 5-64-429. [Reserved.]

### 5-64-430. Delivery of a Schedule III controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to deliver a Schedule III controlled substance.

(b)(1) A person who delivers less than twenty-eight grams (28g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class C felony.

(2) A person who delivers twenty-eight grams (28g) or more but less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class B felony.

(3) A person who delivers two hundred grams (200g) or more but less than four hundred grams (400g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class A felony.

**History.** Acts 2011, No. 570, § 52.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

## RESEARCH REFERENCES

**ALR.** What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8

U.S.C. § 1227(a)(2)(A)(iii)) — Miscellaneous or Unspecified Narcotics Offenses Under 8 U.S.C. § 1101(a)(43)(B). 79 A.L.R. Fed. 2d 335.

### 5-64-431. Manufacture of a Schedule III controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule III controlled substance.

(b)(1) A person who manufactures less than twenty-eight grams (28g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class C felony.

(2) A person who manufactures twenty-eight grams (28g) or more but less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class B felony.

(3) A person who manufactures two hundred grams (200g) or more by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class A felony.

**History.** Acts 2011, No. 570, § 53.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs."

### **5-64-432. Possession of a Schedule IV or Schedule V controlled substance with the purpose to deliver.**

(a) Except as provided by this chapter, it is unlawful if a person possesses a Schedule IV or Schedule V controlled substance with the purpose to deliver the Schedule IV or Schedule V controlled substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh and separate a Schedule IV or Schedule V controlled substance;

(2) The person possesses a record indicating a drug-related transaction;

(3) The Schedule IV or Schedule V controlled substance is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule IV or Schedule V controlled substance;

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule IV or Schedule V controlled substance.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class D felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Less than two hundred grams (200g) of a Schedule IV or Schedule V controlled substance that is not a controlled substance listed in this subdivision (b)(1);

(B) Less than eighty (80) dosage units for any other Schedule IV or Schedule V depressant or hallucinogenic drug; or

(C) Less than eighty (80) dosage units for any other Schedule IV or Schedule V stimulant drug;

(2) Class C felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Two hundred grams (200g) or more but less than four hundred grams (400g) of a Schedule IV or Schedule V controlled substance that is not a controlled substance listed in this subdivision (b)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule IV or Schedule V depressant or hallucinogenic drug; or

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule IV or Schedule V stimulant drug; or

(3) Class B felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Four hundred grams (400g) or more but less than eight hundred grams (800g) of a Schedule IV or Schedule V controlled substance that is not a controlled substance listed in this subdivision (b)(3);

(B) One hundred sixty (160) dosage units or more but less than eight hundred grams (800g) for any other Schedule IV or Schedule V depressant or hallucinogenic drug; or

(C) One hundred sixty (160) dosage units or more but less than eight hundred grams (800g) for any other Schedule IV or Schedule V stimulant drug.

(c) It is a defense to a prosecution under this section that the person possessed less than the minimum listed amount of a Schedule IV or Schedule V controlled substance that is listed in this section.

**History.** Acts 2011, No. 570, § 54; 2013, No. 529, § 3.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offend-

ers accountable, and contain correction costs.”

**Amendments.** The 2013 amendment substituted “Less” for “Forty (40) or more but less” in (b)(1)(B) and (b)(1)(C).

## RESEARCH REFERENCES

**ALR.** What Constitutes “Aggravated Felony” for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8

U.S.C. § 1227(a)(2)(A)(iii)) — Miscellaneous or Unspecified Narcotics Offenses Under 8 U.S.C. § 1101(a)(43)(B). 79 A.L.R. Fed. 2d 335.

### 5-64-433. [Reserved.]

### 5-64-434. Delivery of a Schedule IV or Schedule V controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to deliver a Schedule IV or Schedule V controlled substance.

(b)(1) A person who delivers less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class D felony.

(2) A person who delivers two hundred grams (200g) or more but less than four hundred grams (400g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class C felony.



(3) A person who delivers four hundred grams (400g) or more but less than eight hundred grams (800g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class B felony.

**History.** Acts 2011, No. 570, § 55.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

### CASE NOTES

**Delivery.**

Evidence held sufficient to sustain conviction for delivery of controlled sub-

stance. *Miller v. State*, 253 Ark. 1060, 490 S.W.2d 445 (1973) (decision under prior law).

### 5-64-435. Manufacture of a Schedule IV or Schedule V controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule IV or Schedule V controlled substance.

(b)(1) A person who manufactures less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class D felony.

(2) A person who manufactures two hundred grams (200g) or more but less than four hundred grams (400g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class C felony.

(3) A person who manufactures four hundred grams (400g) or more by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class B felony.

**History.** Acts 2011, No. 570, § 56.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

### 5-64-436. Possession of a Schedule VI controlled substance with the purpose to deliver.

(a) Except as provided by this chapter, it is unlawful if a person possesses a Schedule VI controlled substance with the purpose to deliver the Schedule VI controlled substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh and separate a Schedule VI controlled substance;

(2) The person possesses a record indicating a drug-related transaction;

(3) The Schedule VI controlled substance is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule VI controlled substance;

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule VI controlled substance.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class A misdemeanor if the person possessed by aggregate weight, including an adulterant or diluent, fourteen grams (14g) or less of a Schedule VI controlled substance;

(2) Class D felony if the person possessed more than fourteen grams (14g) but less than four ounces (4 oz.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance;

(3) Class C felony if the person possessed four ounces (4 oz.) or more but less than twenty-five pounds (25 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance;

(4) Class B felony if the person possessed twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance; or

(5) Class A felony if the person possessed one hundred pounds (100 lbs.) or more but less than five hundred pounds (500 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance.

**History.** Acts 2011, No. 570, § 57.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs."

## RESEARCH REFERENCES

**ALR.** What Constitutes "Aggravated Felony" for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Marijuana Offenses Under 8 U.S.C. § 1101(a)(43)(B). 76 A.L.R. Fed. 2d 1.

What Constitutes "Aggravated Felony"

for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Miscellaneous or Unspecified Narcotics Offenses Under 8 U.S.C. § 1101(a)(43)(B). 79 A.L.R. Fed. 2d 335.

## CASE NOTES

### ANALYSIS

Constructive Possession.  
Delivery.  
Participants to Transactions.

### Constructive Possession.

The possession required by this section need not be actual, physical possession, but may be constructive, as when one controls a substance or has the right to

control it. *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986) (decision under prior law).

Where there is joint occupancy of premises, mere occupancy is insufficient to prove possession unless there are additional factors linking the accused with the contraband. *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986) (decision under prior law).

Substantial evidence existed that defendant constructively possessed marijuana; the officer testified that there was an odor of marijuana coming from the vehicle in which defendant was riding and that defendant assumed a nervous and defensive posture when the officer spoke with defendant. *Stewart v. State*, 2010 Ark. App. 495 (2010) (decided under former § 5-64-401).

Sufficient evidence was presented to indicate that defendant knew there was contraband in the flatbed trailer he was towing, even though it was open to access from the general public, because defendant was the only person in the vehicle and more than 200 pounds of marijuana were found. Thus, there was sufficient evidence that he was in actual possession of the drugs. *Barrera v. State*, 2012 Ark. App. 533 (2012) (decision under prior law).

For purposes of defendant's convictions, his absence at the time of the search did not eliminate a conclusion of constructive possession based on the fact that the drugs and firearm were found in a bedroom closet in close proximity, the bedroom was shared by defendant and another, defendant was at the house prior to the search, and he admitted purchasing

the marijuana and possessing the firearm, which inferred more than mere knowledge of the contraband, but also ownership and control over them. *Dotson v. State*, 2013 Ark. App. 550 (2013).

There was sufficient evidence to support convictions for possession of marijuana with intent to deliver and the simultaneous possession of drugs and firearms based on drugs that were discovered behind a shed; defendant emerged from behind the shed, in close proximity to the drugs, there was no possibility that the drugs could have been tossed from a road, and the bag of drugs was clean and dry, despite the rain. Defendant began acting nervous and making spontaneous statements when it was obvious that officers were going to search behind the shed, defendant had a large amount of cash when he was arrested, and he admitted to having a gun. *Block v. State*, 2015 Ark. App. 83, 455 S.W.3d 336 (2015).

#### **Delivery.**

Where the state proved actual delivery there could be no question about the defendant's intent. *Moser v. State*, 266 Ark. 200, 583 S.W.2d 15 (1979) (decision under prior law).

#### **Participants to Transactions.**

Where defendant was present with others during the sale of controlled substance, although he had no direct contact with the officers making the purchase, the trial court could reasonably infer that the defendant, being present, was an active participant in the offense. *Hartman v. State*, 258 Ark. 1018, 530 S.W.2d 366 (1975) (decision under prior law).

### **5-64-437. [Reserved.]**

### **5-64-438. Delivery of a Schedule VI controlled substance.**

(a) Except as provided by this chapter, it is unlawful for a person to deliver a Schedule VI controlled substance.

(b)(1) A person who delivers fourteen grams (14g) or less by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a:

(A) Class A misdemeanor; or

(B) Class D felony if he or she has four (4) or more prior convictions for delivery of a controlled substance in any amount under this subchapter or under the former § 5-64-401.



(2) A person who delivers more than fourteen grams (14g) but less than four ounces (4 oz.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class D felony.

(3) A person who delivers four ounces (4 oz.) or more but less than twenty-five pounds (25 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class C felony.

(4) A person who delivers twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class B felony.

(5) A person who delivers one hundred pounds (100 lbs.) or more but less than five hundred pounds (500 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class A felony.

**History.** Acts 2011, No. 570, § 58; 2013, No. 530, § 1.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offend-

ers accountable, and contain correction costs.”

**Amendments.** The 2013 amendment deleted “Class A misdemeanor” at the end of (b)(1); and added (b)(1)(A) and (b)(1)(B).

## CASE NOTES

### Participants to Transactions.

Case law is well established that one who buys a controlled substance is not an accomplice of the person who sells or delivers it since the buyer and seller do not share the same criminal purpose. *Brizendine v. State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982) (decision under prior law).

Where it was undisputed that the defendant took an undercover narcotics offi-

cer’s money, purchased controlled substance, and then transferred the controlled substance to the undercover officer, the defendant was properly convicted regardless of whether the defendant was acting as an agent of the buyer or the seller. *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985) (decision under prior law).

### 5-64-439. Manufacture of a Schedule VI controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule VI controlled substance.

(b)(1) A person who manufactures fourteen grams (14g) or less by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance is guilty of a Class A misdemeanor.

(2) A person who manufactures more than fourteen grams (14g) but less than four ounces (4 oz.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance is guilty of a Class D felony.

(3) A person who manufactures four ounces (4 oz.) or more but less than twenty-five pounds (25 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class C felony.

- (4) A person who manufactures twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class B felony.
- (5) A person who manufactures one hundred pounds (100 lbs.) or more by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class A felony.

**History.** Acts 2011, No. 570, § 59.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

CASE NOTES

ANALYSIS

Evidence Insufficient.  
Evidence Sufficient.  
Lesser-Included Offenses.  
Manufacture.

**Evidence Insufficient.**  
Evidence was insufficient to compel reasonable minds to conclude that defendant was at the crime scene, and even less sufficient to compel the conclusion that he was engaged in the “manufacture” of marijuana. *Standridge v. State*, 310 Ark. 408, 837 S.W.2d 447 (1992) (decision under prior law).

**Evidence Sufficient.**  
Testimony from a crime lab analyst that the bags contained marijuana with a total aggregate weight of 407.7 grams or 14.381 ounces was sufficient to support defendant’s conviction for manufacturing more than four ounces of marijuana. *Brown v. State*, 2014 Ark. App. 474, 442 S.W.3d 8 (2014).

**Lesser-Included Offenses.**  
Possession of a controlled substance is a lesser included offense of manufacturing a controlled substance. *Craig v. State*, 314 Ark. 585, 863 S.W.2d 825 (1993) (decided under former § 5-64-401).

**Manufacture.**  
Since marijuana can be manufactured or produced only by cultivating the plants, defendant, who admitted growing marijuana with intent to harvest it, could be convicted of “manufacturing” marijuana irregardless of defendant’s personal reasons for such production. *Patty v. State*, 260 Ark. 539, 542 S.W.2d 494 (1976) (decision under prior law).

Defendant who watered, pruned and generally tended the marijuana plant next to his office building clearly violated the prohibition against the manufacture of a controlled substance. *Craig v. State*, 314 Ark. 585, 863 S.W.2d 825 (1993) (decided under former § 5-64-401).

5-64-440. Trafficking a controlled substance.

- (a) Except as provided by this chapter, it is unlawful for a person to engage in trafficking a controlled substance.
- (b) A person engages in trafficking a controlled substance if he or she possesses, possesses with the purpose to deliver, delivers, or manufactures a controlled substance by aggregate weight, including an adulterant or diluent, in the following amounts:
- (1) Methamphetamine or cocaine, two hundred grams (200g) or more;

(2) Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine, two hundred grams (200g) or more;

(3) Schedule III controlled substance, four hundred grams (400g) or more;

(4) Schedule IV or Schedule V controlled substance, eight hundred grams (800g) or more; or

(5) A Schedule VI controlled substance, five hundred pounds (500 lbs.) or more.

(c) Trafficking a controlled substance is a Class Y felony.

**History.** Acts 2011, No. 570, § 60; 2013, No. 529, § 4.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offend-

ers accountable, and contain correction costs.”

**Amendments.** The 2013 amendment inserted “possesses with the purpose to deliver, delivers, or manufactures” in the introductory language of (b).

## CASE NOTES

### Evidence.

In a case involving drugs and weapons offenses, it was error to allow a video of law enforcement officers firing a weapon found in the search of the home to be played for the jury and admitted into evidence because it was not relevant to any of the specific offenses charged as the

offenses did not require that the weapon be fireable; however, the error was harmless because the evidence against defendant was overwhelming and defendant’s sentences fell within the statutory sentence ranges. *Gutierrez v. State*, 2015 Ark. App. 516, 472 S.W.3d 147 (2015).

## 5-64-441. Possession of a counterfeit substance.

(a) It is unlawful for any person to possess a counterfeit substance unless the counterfeit substance was obtained:

(1) Directly from or pursuant to a valid prescription or an order of a practitioner while acting in the course of his or her professional practice; or

(2) As otherwise authorized by this chapter.

(b) Any person who violates this section with respect to:

(1) A Schedule I or Schedule II controlled substance upon conviction is guilty of a Class D felony;

(2) Any other controlled substance, first offense or second offense, upon conviction is guilty of a Class A misdemeanor; and

(3) Any other controlled substance, third or subsequent offense, upon conviction is guilty of a Class D felony.

(c) For purposes of subsection (b) of this section, an offense is considered a third or subsequent offense if, before his or her conviction for the offense, the person has been convicted two (2) or more times for an offense under subsection (b) of this section or under any equivalent penal statute of the United States or of any state.

**History.** Acts 2011, No. 570, § 61; 2013, No. 1125, § 13.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Amendments.** The 2013 amendment inserted “upon conviction” in (b)(1).



## CASE NOTES

**Evidence Sufficient.**

Trial court clearly did not err in denying the motion for directed verdict or its renewal, because the evidence was sufficient to convict defendant of possession of a counterfeit controlled substance, when the soap substance was packaged in a

quantity and shape that had all the outward indications of appearing to be crack cocaine, and defendant stated in response to the officer's query that he thought he was getting cocaine. *Caldwell v. State*, 2009 Ark. App. 526, 334 S.W.3d 82 (2009) (decided under former § 5-64-401).

**5-64-442. Possession with the purpose to deliver, delivery, or manufacture of a counterfeit substance.**

(a) Except as authorized by this chapter, it is unlawful for any person to possess with the purpose to deliver, deliver, or manufacture a counterfeit substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package a counterfeit substance;

(2) The person possesses a record indicating a drug-related transaction;

(3) The counterfeit substance is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the counterfeit substance;

(5) The person possesses at least two (2) other controlled substances or counterfeit substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a counterfeit substance.

(b) Any person who violates this section with respect to:

(1) A counterfeit substance purporting to be a Schedule I or Schedule II controlled substance upon conviction is guilty of a Class C felony;

(2) A counterfeit substance purporting to be a Schedule III controlled substance upon conviction is guilty of a Class D felony; or

(3) A counterfeit substance purporting to be a Schedule IV, Schedule V, or Schedule VI controlled substance or that is not classified as a scheduled controlled substance upon conviction is guilty of a Class A misdemeanor.

**History.** Acts 2011, No. 570, § 62; 2013, No. 529, § 5; 2013, No. 1125, § 14.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2013 amendment by No. 529 amended the section heading

by adding "Possession with the purpose to deliver"; in (a), added "possess with the purpose to deliver", "Purpose to deliver may be shown by any of the following factors" in the introductory language, and added (1) through (6).

The 2013 amendment by No. 1125 substituted "IV, Schedule V, or Schedule VI" for "IV-VI" in (b)(3).

## CASE NOTES

## ANALYSIS

Elements.

Revocation of Probation.

**Elements.**

State's failure to prove that a substance was a statutorily-defined "counterfeit substance" was fatal to defendant's criminal conviction for possession of a counterfeit substance with the intent to deliver, especially where there was no evidence of attempted delivery; the only factor that the state proved was that the physical appearance of the finished product containing the noncontrolled substance was substantially the same as that of a specific controlled substance. *Jackson v. State*, 86

Ark. App. 145, 165 S.W.3d 467 (2004) (decided under former § 5-64-401).

**Revocation of Probation.**

Trial court did not err in refusing to allow defendant the opportunity to question crime lab personnel after he had properly demanded to do so, pursuant to § 12-12-313, as it was a felony to sell counterfeit drug substances; defendant had committed an offense punishable by incarceration and was subject to a revocation of his probation, whether or not the substances found in the two baggies were narcotics, thus, the crime lab personnel's testimony was not necessary to prove the prosecution's case. *Roston v. State*, 362 Ark. 408, 208 S.W.3d 759 (2005) (decided under former § 5-64-401).

**5-64-443. Drug paraphernalia.**

(a) A person who possesses drug paraphernalia with the purpose to use the drug paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter upon conviction is guilty of:

(1) A Class A misdemeanor; or

(2) A Class D felony if the controlled substance is methamphetamine or cocaine.

(b) A person who uses or possesses with the purpose to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance that is methamphetamine or cocaine upon conviction is guilty of a Class B felony.

(c) A person who uses or possesses with the purpose to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance that is not methamphetamine or cocaine upon conviction is guilty of a Class D felony.

**History.** Acts 2011, No. 570, § 63.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offend-

ers accountable, and contain correction costs."

**Cross References.** Civil actions against sellers of drug paraphernalia, § 16-118-108.

## CASE NOTES

## ANALYSIS

Constitutionality.

Bond.

Dismissal Denied.

Evidence.

Evidence Insufficient.

Evidence Sufficient.

—Methamphetamine Manufacture.

Harmless Error.

Lesser-Included Offenses.

Motion to Suppress.

Possession.

Search.

Sentencing.

Suppression of Evidence.

**Constitutionality.**

Acts 1981, No. 78, which criminalized the possession, use, sale and manufacture of drug paraphernalia, is not unconstitutionally overbroad even though the act may prevent persons from utilizing the expressions imprinted on, or the symbolic speech represented by the use of, drug paraphernalia. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984); *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989).

Statutory provisions concerning the term “drug paraphernalia” are not unconstitutionally vague for want of “certainty” or “definiteness,” since they give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988) (decided under former § 5-64-403(c)).

The drug paraphernalia law is not unconstitutionally vague, because the detailed definitions found in the statute give adequate notice of conduct constituting the offense. *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992) (decided under former § 5-64-403(c)).

State was authorized to seek the greatest penalty, the Class B felony, where drug paraphernalia is possessed with the intent to manufacture methamphetamine; further, the statutory provision was not so vague and standardless that it allowed for arbitrary and discriminatory enforcement, nor did the fact that the prosecutor exercised discretion in seeking the maximum penalty give rise to a constitutional infringement. *Osborne v. State*, 94 Ark.

App. 337, 230 S.W.3d 290 (2006) (decided under former § 5-64-403(c)).

**Bond.**

Because the appellate court affirmed the trial court’s judgment convicting defendant of possession of drug paraphernalia with intent to manufacture and possession of a controlled substance, defendant’s issue of bail pending appeal became moot and the appellate court did not have to decide moot issues; the appropriate and meaningful action that defendant could have taken would have been to petition the appellate court for a writ of certiorari separately challenging the trial court’s denial of an appeal bond. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003) (decided under former § 5-64-403(c)).

**Dismissal Denied.**

Motion to dismiss was properly denied in a case involving possession with intent to use drug paraphernalia because a crack pipe constituted paraphernalia under § 5-64-101; further, there was sufficient evidence of intent where defendant admitted the pipe was his, cocaine residue was found on the pipe, and defendant admitted to using it to smoke cocaine in the past. *White v. State*, 98 Ark. App. 366, 255 S.W.3d 881 (2007) (decided under former § 5-64-403(c)).

**Evidence.**

Court erroneously precluded state from introducing evidence of officer concerning use of antenna, found on the defendant, as drug paraphernalia. *State v. Crutchfield*, 306 Ark. 104, 816 S.W.2d 884 (1991) (supplemental op. on rehearing) (decided under former § 5-64-403(c)).

The trial evidence would have been sufficient to support defendant’s conviction for possession of drug paraphernalia had the court allowed testimony from the officer concerning use of antenna, found on defendant, as drug paraphernalia; therefore, the case was remanded for retrial on the charge of possession of drug paraphernalia. *State v. Crutchfield*, 306 Ark. 104, 816 S.W.2d 884 (1991) (supplemental op. on rehearing) (decided under former § 5-64-403(c)).

In a case involving drugs and weapons offenses, it was error to allow a video of law enforcement officers firing a weapon



found in the search of the home to be played for the jury and admitted into evidence because it was not relevant to any of the specific offenses charged as the offenses did not require that the weapon be fireable; however, the error was harmless because the evidence against defendant was overwhelming and defendant's sentences fell within the statutory sentence ranges. *Gutierrez v. State*, 2015 Ark. App. 516, 472 S.W.3d 147 (2015).

### **Evidence Insufficient.**

In a drug paraphernalia case, the evidence was insufficient to sustain defendant's conviction where police found no paraphernalia on defendant; rather, it was found some distance away from where defendant was stopped and there were no affirmative links between defendant and the paraphernalia. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003) (decided under former § 5-64-403(c)).

### **Evidence Sufficient.**

Evidence held sufficient to support a conviction for possession of drug paraphernalia. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991); *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993); *Stephenson v. State*, 334 Ark. 520, 975 S.W.2d 830 (1998) (decided under former § 5-64-403(c)).

Evidence of possession with intent to deliver a controlled substance (marijuana) and possession with intent to use drug paraphernalia held sufficient. *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994) (decided under former § 5-64-403(c)).

Evidence of possession of marijuana, possession of drug paraphernalia, and possession of an illicit whiskey still, found in defendant's residence, held sufficient. *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994) (decided under former § 5-64-403(c)).

Evidence was sufficient to convict the defendant of possession of drug paraphernalia where the defendant possessed a cigar case in which methamphetamine and marijuana were hidden; the jury could have concluded that the case was used as a container to conceal controlled substances. *Sanders v. State*, 76 Ark. App. 104, 61 S.W.3d 871 (2001), cert. denied, 537 U.S. 815, 123 S. Ct. 82, 154 L. Ed. 2d 19 (2002) (decided under former § 5-64-403(c)).

Evidence was sufficient to sustain a drug paraphernalia possession conviction where the syringe in defendant's pocket was in close proximity to the methamphetamine found in the plastic bags behind his driver's seat. *Jones v. State*, 357 Ark. 545, 182 S.W.3d 485 (2004) (decided under former § 5-64-403(c)).

Evidence was sufficient to sustain defendant's conviction for possession of drug paraphernalia because defendant lived in the residence, and at no point did he deny an ownership or possessory interest in the residence. Testimony established that items of paraphernalia, the spoon with residue, the light bulb, the scales, and the plastic baggies were found in plain view in the southeast bedroom and that the items would have been noticeable to anyone who lived in residence. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007) (decided under former § 5-64-403(c)).

There was substantial evidence that defendant exercised care, control, and management over contraband, where: (1) he lived at the house where the contraband was discovered, (2) a police officer found several illegal items lying in close proximity to defendant, and (3) there was no evidence that there were other suspects in the home at the time of the raid that may have also lived there. *Allen v. State*, 2010 Ark. App. 266 (2010) (decided under former § 5-64-403(c)).

Evidence was sufficient to support defendant's conviction for possession of drug paraphernalia because he was present at the scene where the drug paraphernalia was in plain view and he admitted to being aware of what was going on and that he planned to help with the manufacture of methamphetamine by getting lithium batteries. *Collier v. State*, 2014 Ark. App. 244 (2014).

There was sufficient evidence to support a conviction of possession of drug paraphernalia under this section because, despite defendant's argument that certain evidence should have been suppressed, the appellate court considered all of the evidence introduced at trial and disregarded any trial errors. Drug paraphernalia was found in a vehicle where defendant was a passenger, a search of defendant's person revealed a syringe and a syringe cap, and he made a statement about getting high on methamphetamine. *Tennant v. State*, 2015 Ark. App. 81 (2015).

**—Methamphetamine Manufacture.**

Trial court properly denied defendant's motion for directed verdict on his convictions for possession of drug paraphernalia with intent to manufacture and possession of a controlled substance because the evidence sufficiently linked defendant to the contraband in that it showed that: (1) there was an operational methamphetamine lab in the kitchen of the shared residence; (2) numerous items used for the manufacture of crystal methamphetamine were seized from the residence; (3) drug paraphernalia was also found in a burn barrel near the residence and in the trash can on the back porch, indicating an ongoing drug manufacturing process; (4) the trash bags found on the side of the road alerted the drug task force to the existence of an illegal drug lab and included a receipt from a store that listed several items used to manufacture crystal methamphetamine that was traced to defendant; and (5) the jury was not required to believe defendant's statements regarding items found in his office and his denial of any knowledge of the contraband. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003) (decided under former § 5-64-403(c)).

Given that defendant owned the premises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in his pocket, there was sufficient evidence whereby a jury could convict defendant of possession of drug paraphernalia with the intent to manufacture methamphetamine and of being an accomplice to drug crimes. *Lueken v. State*, 88 Ark. App. 323, 198 S.W.3d 547 (2004) (decided under former § 5-64-403(c)).

Evidence was sufficient to sustain defendant's conviction for possession of drug paraphernalia with intent to manufacture methamphetamine because defendant's control and knowledge of the drug could be inferred from the circumstances where (1) although defendant claimed he was burning his wife's methamphetamine lab, he knew it was a methamphetamine lab, (2) the wife testified that defendant manufactured methamphetamine on a regular basis and that he sold or traded the methamphetamine he produced, (3) items associated with the production of methamphetamine were scattered throughout

defendant's house, some in plain view, and (4) defendant's hands were stained with iodine, an ingredient used in the manufacturing process. *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115 (2004) (decided under former § 5-64-403(c)).

Trial court erred in reversing defendant's conviction for possession of drug paraphernalia with intent to manufacture methamphetamine as his conviction was supported by sufficient evidence, including (1) testimony from a police officer who saw defendant buy iodine and found other items used to manufacture methamphetamine at defendant's home, (2) testimony from defendant's parole officer regarding defendant's prior convictions relating to methamphetamine, and (3) expert testimony concerning how the items found in defendant's possession were used to manufacture methamphetamine. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006) (decided under former § 5-64-403(c)).

Evidence was sufficient to sustain a conviction for possession of drug paraphernalia with intent to manufacture methamphetamine where an accomplice testified that defendant was inside his residence "cleaning up a cook" and "bagging everything up"; that testimony was corroborated by an officer who stated that, when he entered the home, defendant was in close proximity to the manufacturing items that were seized from the residence. *Fitting v. State*, 94 Ark. App. 283, 229 S.W.3d 568 (2006) (decided under former § 5-64-403(c)).

Judgment convicting defendant of manufacturing methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, first-degree endangering the welfare of a minor under § 5-27-205(a)(1), manufacturing methamphetamine in the presence of a minor, and manufacturing methamphetamine near certain facilities was affirmed because contraband was found in the kitchen and bedroom of defendant's residence, strewn about his yard, and in an outbuilding behind his residence; the materials found in the search were the components of a methamphetamine lab; at least two of defendant's minor children were present in the residence at the time of the search; and the drug paraphernalia and chemicals found could easily be accessed by the children. *Morgan v. State*, 2009 Ark. 257, 308



S.W.3d 147 (2009) (decided under former § 5-64-403(c)).

Evidence was sufficient to support defendant's conviction of possession of drug paraphernalia with intent to manufacture because the jury could reasonably conclude that defendant constructively possessed the paraphernalia with intent to manufacture where defendant owned the property jointly with his wife, defendant was the only person in the house when the police arrived, and defendant admitted to the officers that the methamphetamine lab in the home was his. *Cantrell v. State*, 2009 Ark. 456, 343 S.W.3d 591 (2009) (decided under former § 5-64-403(c)).

Defendant was convicted of possessing drug paraphernalia with intent to manufacture; based on the evidence of defendant's proximity to the manufacturing paraphernalia, the circuit court did not err in denying defendant's directed-verdict motion. *Holt v. State*, 2009 Ark. 482, 348 S.W.3d 562 (2009) (decided under former § 5-64-403(c)).

Trial court did not err in revoking defendant's suspended sentence on the ground that he committed the offense of possession of drug paraphernalia with the intent to manufacture methamphetamine because the evidence showed that a reliable source had tipped off the police to the fact that defendant, contrary to the terms and conditions of his release, was continuing to manufacture methamphetamine, and defendant directed the purchases and provided an explanation for each component of the methamphetamine recipe; it was shown that defendant conceived and proposed the methamphetamine cook, buy, and sell arrangement for the manufacture and distribution of the illegal substance, and simply by asserting the defense of entrapment, § 5-2-209, defendant necessarily admitted committing the offense. *Lowe v. State*, 2010 Ark. App. 284 (2010) (decided under former § 5-64-403(c)).

Evidence that there was a funnel, plastic tubing, coffee filters, camp fuel, syringes, gloves, a metal spoon, a smoking device, a bag of ammonia nitrate, and a pill crusher in the master bedroom of defendant's home, along with a burn barrel in the back yard, was sufficient to support a conviction for possession of paraphernalia with intent to manufacture. *Gowen v. State*, 2011 Ark. App. 761,

387 S.W.3d 230 (2011) (decided under former § 5-64-403(c)).

Sufficient evidence supported a finding that defendant had the intent to manufacture methamphetamine because the jury could choose to believe that defendant knew the iodine he possessed was going to be used to make methamphetamine, despite his argument that he bought it for a friend and that no other ingredients were found. *Ashley v. State*, 2012 Ark. App. 131, 388 S.W.3d 914 (2012) (decided under former § 5-64-403(c)).

### **Harmless Error.**

In a prosecution for possession and delivery of a drug, erroneous admission of certain drug paraphernalia was harmless error where there was overwhelming evidence to support a conviction. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997).

### **Lesser-Included Offenses.**

Trial court did not err in failing to give lesser-included offense instruction because possession of pseudoephedrine with intent to manufacture methamphetamine under § 5-64-1102(a)(1) was not a lesser-included offense of possession of drug paraphernalia with intent to manufacture methamphetamine under former § 5-64-403(c) (now this section); the paraphernalia offense requires the intent to "use" the drug paraphernalia to manufacture methamphetamine, while § 5-64-1102(a)(1) does not and, therefore, the two statutes contain different elements. *Autrey v. State*, 90 Ark. App. 131, 204 S.W.3d 84 (2005).

Possession of a controlled substance does not require the simultaneous possession of paraphernalia, and possession of paraphernalia does not require the simultaneous possession of a controlled substance; the elements of the two offenses can be completely exclusive of each other and neither is a lesser-included offense of the other. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008) (decided under former § 5-64-403(c)).

### **Motion to Suppress.**

Where defendant appealed his convictions for violating subsection (c) of this section and § 5-64-420, circuit court's decision to deny his motion to suppress the evidence was not clearly against the preponderance of the evidence. Because he



met the officers on his front porch with a rifle, an officer reasonably detained and frisked him to ensure the officers' safety, and the contraband was discovered when, after the valid frisk, defendant voluntarily pulled the contraband out of his pocket and showed it to the officer. *King v. State*, 2014 Ark. App. 81, 432 S.W.3d 127 (2014).

### **Possession.**

Where contraband is discovered in jointly occupied premises and there is no direct evidence that it belongs to a particular occupant, some additional factors must be present linking the accused to the contraband; the state must prove that the accused exercised care, control and management over the contraband. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003) (decided under former § 5-64-403(c)).

Evidence was sufficient to convict defendant of several possession-related offenses given that a crack house was rented to him, a confidential informant testified that he purchased drugs from defendant a day earlier, the serial numbers of money found on defendant matched the money used in the controlled buy, and drugs and drug paraphernalia were in plain view in the home. *Carter v. State*, 2010 Ark. 293, 367 S.W.3d 544 (2010) (decided under former § 5-64-403(c)).

Evidence supported a finding that defendant was in constructive possession of drug paraphernalia, as although a house was jointly occupied, there was evidence that defendant told a law enforcement officer that defendant lived there, and that there were male personal effects in the bedroom; a jury could reasonably infer that defendant knew the drug paraphernalia was contraband and that defendant exercised control over it. *Burrow v. State*, 2010 Ark. App. 692 (2010) (decided under former § 5-64-403(c)).

Since the testimony was that only defendant and his girlfriend were in the girlfriend's home, and they both agreed that the girlfriend was not involved in drugs, the jury could reasonably infer that as the only other adult in the home defendant exercised control over the contraband and knew it was contraband. *Matlock v. State*, 2015 Ark. App. 65, 454 S.W.3d 776 (2015).

### **Search.**

In a possession of drug paraphernalia with intent to manufacture and posses-

sion of a controlled substance case, the search warrant was valid and the trial court properly denied defendant's motion to suppress the evidence seized from the shared residence where: (1) the distinctive odor of a methamphetamine lab was a valid contributing factor in establishing probable cause for the warrant; (2) the search warrant was supported by more than mere conclusory statements; (3) the initial search of the residence was limited to the common area outside the residence where no warrant was required, and the search inside the residence was pursuant to a search warrant; (4) even if the landlord's statements were completely eliminated, there were still sufficient facts to support probable cause to search the residence; and (5) the partially incorrect address listed in the search warrant did not make the search warrant defective, especially since the affidavit correctly identified the residence and the officer who had obtained the search warrant and had previously been to the residence would later, himself, conduct the search. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003) (decided under former § 5-64-403(c)).

### **Sentencing.**

Felony convictions for the related offenses of possession of a controlled substance and possession of drug paraphernalia under this section fall under two separate statutes and are not considered one offense for the purposes of sentencing under § 5-4-501. *McCullough v. State*, 44 Ark. App. 99, 866 S.W.2d 845 (1993) (decided under former § 5-64-403(c)).

Where defendant was guilty of manufacturing methamphetamine, and possession of drug paraphernalia with intent to manufacture methamphetamine, and the circuit court sentenced him as a habitual offender pursuant to § 5-4-501, the sentence was illegal because under § 5-4-301(a)(2), the circuit court did not have the authority to suspend 10 years of the 15-year sentence it imposed. *State v. O'Quinn*, 2013 Ark. 219, 427 S.W.3d 668 (2013) (decided under former §§ 5-64-401, 5-64-403(c)).

### **Suppression of Evidence.**

Contact between defendant and an officer was the result of an investigation into drug-related criminal activity, not a routine traffic stop, because the officer

blocked the vehicle in the driveway, demanded that defendant move to the back of the vehicle, informed her that he knew there were drugs in the vehicle, and asked where they were located. Defendant's pre-

Miranda statement should have been suppressed. *James v. State*, 2012 Ark. App. 118, 390 S.W.3d 95 (2012) (decided under former § 5-64-403(c)).

#### **5-64-444. Drug paraphernalia — Delivery to a minor.**

(a) A person eighteen (18) years of age or older who violates § 5-64-443 by delivering drug paraphernalia in the course of and in furtherance of a felony violation of this chapter to a person under eighteen (18) years of age who is at least three (3) years younger than the person upon conviction is guilty of a Class B felony.

(b) Otherwise, a person eighteen (18) years of age or older who violates § 5-64-443 by delivering drug paraphernalia to a person under eighteen (18) years of age who is at least three (3) years younger than the person upon conviction is guilty of a Class A misdemeanor.

**History.** Acts 2011, No. 570, § 64.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs."

#### **5-64-445. Advertisement of a counterfeit substance or drug paraphernalia.**

A person who places in any newspaper, magazine, handbill, or other publication any advertisement knowing, or under circumstances in which a person reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of a counterfeit substance or of an object designed or intended for use as drug paraphernalia upon conviction is guilty of a Class C felony.

**History.** Acts 2011, No. 570, § 65.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs."

#### **5-64-446. Civil or criminal liability.**

(a) Civil or criminal liability shall not be imposed by this chapter on any practitioner who manufactures, distributes, or possesses a counterfeit substance for use by a practitioner in the course of professional practice or research or for use as a placebo by a practitioner in the course of professional practice or research.

(b)(1) A person who violates §§ 5-64-419 — 5-64-442 is liable for the cost of the cleanup of the site where the person:

(A) Manufactured a controlled substance; or

(B) Possessed drug paraphernalia or a chemical for the purpose of manufacturing a controlled substance.

(2) The person shall make restitution to the state or local agency responsible for the cleanup for the cost of the cleanup under § 5-4-205.

**History.** Acts 2011, No. 570, § 66.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures de-

signed to reduce recidivism, hold offenders accountable, and contain correction costs.”

## SUBCHAPTER 5 — UNIFORM CONTROLLED SUBSTANCES ACT — ENFORCEMENT AND ADMINISTRATION

### SECTION.

- 5-64-501. Powers of officials generally.
- 5-64-502. Issuance and execution of administrative inspection warrants.
- 5-64-503. Injunctions or restraining orders.
- 5-64-504. Intergovernmental cooperation — Identities of patients and research subjects.
- 5-64-505. Property subject to forfeiture — Procedure — Disposition of property.

### SECTION.

- 5-64-506. Burden of proof — Liability of officers.
- 5-64-507. Conclusiveness of findings.
- 5-64-508. Prevention and deterrence — Educational and research programs.
- 5-64-509. [Repealed.]
- 5-64-510. Methamphetamine-contaminated motor vehicles.

**A.C.R.C. Notes.** Acts 1989 (3rd Ex. Sess.), No. 87, § 5, provided: “(a) Civil seizures or forfeitures and injunctive proceedings commenced before the effective date of this act are not affected by this act.

“(b) This section applies to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations which occur following its effective date.”

Acts 1989 (3rd Ex. Sess.), No. 87, § 6, provided: “Any orders and rules adopted under any law affected by this act and in effect on the effective date of this act and not in conflict with this act continue in effect until modified, superseded, or repealed.”

**Publisher’s Notes.** Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Department of Health or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

**Effective Dates.** Acts 1972 (1st Ex. Sess.), No. 67, § 9: Mar. 6, 1972. Emergency clause provided: “It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act

590 of 1971; that the penalties prescribed in Act 590 are in need of clarification; that the problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in the enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1981, No. 78, § 7: became law without Governor’s signature. Noted Feb. 15, 1981. Emergency clause provided: “It is hereby found and determined by the General Assembly that there is an increasing problem of drug abuse in the State of Arkansas and that in order to protect the public health and safety immediate steps must be taken to enact a comprehensive Drug Paraphernalia Act and the immediate passage of this Act is necessary to accomplish this purpose; therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full



force from and after its passage and approval.”

Acts 1983, No. 787, § 10: Mar. 24, 1983. Emergency clause provided: “It is hereby found and determined by the General Assembly that there is an increasing problem of counterfeit substances in the State of Arkansas and that in order to protect the public health and safety, immediate steps must be taken to establish a system of punishment for those possessing or distributing such substances. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval.”

Acts 2007, No. 830, § 2: July 1, 2007. Emergency clause provides: “It is found and determined by the General Assembly of the State of Arkansas that the provisions of this act are needed to comply with the federal regulation sharing program; that this act will allow consistent application of the federal regulation sharing program and avoid confusion if it becomes effective on July 1, 2007; and that this act is immediately necessary because unless the emergency clause is adopted, the act will not go into effect until after the beginning of the next fiscal year. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007.”

### CASE NOTES

#### In General.

This subchapter is remedial. *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996).

#### 5-64-501. Powers of officials generally.

Any law enforcement officer, any person authorized to enforce this chapter, or any employee of the Department of Health designated by the Director of the Department of Health to conduct an examination, investigation, or inspection under this chapter relating to a controlled substance or to a counterfeit drug may:

- (1) Carry a firearm in the performance of his or her official duties;
- (2) Execute and serve a search warrant, arrest warrant, administrative inspection warrant, subpoena, or summons issued under the authority of this state;
- (3) Make an arrest without warrant for any offense under this chapter committed in his or her presence, or if he or she has probable cause to believe that the person to be arrested has committed a violation of this chapter that may constitute a felony;
- (4) Make a seizure of property pursuant to this chapter; or
- (5) Perform any other law enforcement duty as the director designates.

**History.** Acts 1971, No. 590, Art. 5, § 1; 1972 (1st Ex. Sess.), No. 67, § 5; 1979, No. 898, § 14; A.S.A. 1947, § 82-2625; Acts 2005, No. 1994, § 308.

**Publisher's Notes.** Acts 1972 (1st Ex. Sess.), No. 67, § 4, provided that nothing in Acts 1972 (1st Ex. Sess.), No. 67, which

amended various provisions of Acts 1971, No. 590, was to limit or to be construed as limiting or restricting the investigatory, inspection, or disciplinary powers of any licensing and disciplining board authorized by law.

**Cross References.** Authority to inves-

tigate and arrest in contiguous county,  
§ 12-12-102.

### CASE NOTES

**Cited:** Hosto v. Brickell, 265 Ark. 147,  
577 S.W.2d 401 (1979).

### **5-64-502. Issuance and execution of administrative inspection warrants.**

(a) Issuance and execution of an administrative inspection warrant shall be as follows:

(1)(A) A judge of a court of record, within his or her jurisdiction, and upon proper oath or affirmation showing probable cause, may issue a warrant for the purpose of conducting an administrative inspection authorized by this chapter or a rule under this chapter, and a seizure of property appropriate to the administrative inspection.

(B) For purposes of the issuance of an administrative inspection warrant, probable cause exists from showing a valid public interest in the effective enforcement of this chapter or a rule under this chapter, sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the administrative inspection warrant;

(2)(A) An administrative inspection warrant shall issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate, and establishing the grounds for issuing the administrative inspection warrant.

(B) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he or she shall issue an administrative inspection warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any.

(C) The administrative inspection warrant shall:

(i) State the grounds for its issuance and the name of each person whose affidavit has been taken in support of it;

(ii) Be directed to a person authorized by § 5-64-501 to execute it;

(iii) Command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(iv) Identify the item or types of property to be seized, if any; and

(v) Direct that it be served during normal business hours and designate the judge or magistrate to whom it shall be returned;

(3)(A) An administrative inspection warrant issued pursuant to this section shall be executed and returned within ten (10) days of its date unless, upon a showing of a need for additional time, the court orders otherwise.

(B) If property is seized pursuant to an administrative inspection warrant, a copy of the administrative inspection warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken.

(C)(i) The return of the administrative inspection warrant shall be made promptly, accompanied by a written inventory of any property taken.

(ii) The inventory shall be made in the presence of the person executing the administrative inspection warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one (1) credible person other than the person executing the administrative inspection warrant.

(iii) A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the administrative inspection warrant; and

(4) The judge or magistrate who has issued an administrative inspection warrant shall attach to it a copy of the return and any paper returnable in connection with it and file the administrative inspection warrant, the copy of the return, and any paper returnable in connection with the administrative inspection warrant with the circuit clerk of the county where the inspection was made.

(b) The Arkansas Drug Director may make an administrative inspection of controlled premises in accordance with the following provisions:

(1) As used in this section, "controlled premises" means:

(A) A place where a person is required by state law to keep records; and

(B) A place including a factory, warehouse, establishment, or conveyance where a person registered or exempted from registration requirements under this chapter is permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance;

(2) When authorized by an administrative inspection warrant issued pursuant to subsection (a) of this section an officer or employee designated by the director, upon presenting the administrative inspection warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection;

(3) When authorized by an administrative inspection warrant, an officer or employee designated by the director may:

(A) Inspect and copy a record required by this chapter to be kept;

(B) Inspect, within reasonable limits and in a reasonable manner, controlled premises and any pertinent equipment, finished and unfinished material, container or labeling found in the controlled premises, and, except as provided in subdivision (b)(5) of this section, any other thing in the controlled premises, including a record, file, paper, process, control, or facility bearing on a violation of this chapter; and



(C) Inventory any stock of any controlled substance in the controlled premises and obtain samples of the stock of any controlled substance;

(4) This section does not prevent the inspection without an administrative inspection warrant of a book or record pursuant to an administrative subpoena, nor does it prevent an entry or an administrative inspection, including a seizure of property, without an administrative inspection warrant:

(A) If the owner, operator, or agent in charge of the controlled premises consents;

(B) In a situation presenting imminent danger to health or safety;

(C) In a situation involving inspection of a conveyance if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain an administrative inspection warrant;

(D) In any other exceptional or emergency circumstance when time or opportunity to apply for an administrative inspection warrant is lacking; or

(E) In any other situation in which an administrative inspection warrant is not constitutionally required; and

(5) An inspection authorized by this section does not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

**History.** Acts 1971, No. 590, Art. 5, § 2;  
A.S.A. 1947, § 82-2626; Acts 2005, No.  
1994, § 308.

#### CASE NOTES

##### **Construction.**

This section must be read as an act authorizing administrative inspection warrants and regulating their issuance and execution when constitutionally re-

quired, and not as a limitation on actions where a warrant is not required. *Hosto v. Brickell*, 265 Ark. 147, 577 S.W.2d 401 (1979).

##### **5-64-503. Injunctions or restraining orders.**

(a) A trial court of this state may exercise jurisdiction to restrain or enjoin a violation of this chapter.

(b) The defendant may demand a trial by jury for an alleged violation of an injunction or restraining order under this section.

**History.** Acts 1971, No. 590, Art. 5, § 3;  
A.S.A. 1947, § 82-2627.

##### **5-64-504. Intergovernmental cooperation — Identities of patients and research subjects.**

(a)(1) The Director of the Department of Health shall cooperate with federal and any other state agency in discharging the agency's respon-

sibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances.

(2) To this end, the director may:

(A) Arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(B) Coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;

(C)(i) Cooperate with the United States Drug Enforcement Administration by establishing a centralized unit to accept, catalogue, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within the state and make the information available for federal, state, and local law enforcement purposes.

(ii) The director shall not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (c) of this section; and

(D) Conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the United States Drug Enforcement Administration relating to the regulatory functions of this chapter, including a result of an inspection conducted by the United States Drug Enforcement Administration, may be relied and acted upon by the director in the exercise of the Department of Health's regulatory functions under this chapter.

(c) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the director nor may he or she be compelled in any state or local civil, criminal, administrative, legislative, or other proceeding to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

**History.** Acts 1971, No. 590, Art. 5, § 4;  
A.S.A. 1947, § 82-2628; Acts 2005, No.  
1994, § 309.

### **5-64-505. Property subject to forfeiture — Procedure — Disposition of property.**

(a) **ITEMS SUBJECT TO FORFEITURE.** The following are subject to forfeiture upon the initiation of a civil proceeding filed by the prosecuting attorney and when so ordered by the circuit court in accordance with this section, however no property is subject to forfeiture based solely upon a misdemeanor possession of a Schedule III, Schedule IV, Schedule V, or Schedule VI controlled substance:

(1) Any controlled substance or counterfeit substance that has been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(2) Any raw material, product, or equipment of any kind that is used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or counterfeit substance in violation of this chapter;

(3) Any property that is used, or intended for use, as a container for property described in subdivision (a)(1) or subdivision (a)(2) of this section;

(4) Any conveyance, including an aircraft, vehicle, or vessel that is used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale or receipt of property described in subdivision (a)(1) or subdivision (a)(2) of this section, however:

(A) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

(B)(i) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent.

(ii) Upon a showing described in subdivision (a)(4)(B)(i) of this section by the owner or interest holder, the conveyance may nevertheless be forfeited if the prosecuting attorney establishes that the owner or interest holder either knew or should reasonably have known that the conveyance would be used to transport or in any manner to facilitate the transportation for the purpose of sale or receipt of property described in subdivision (a)(1) or subdivision (a)(2) of this section;

(C) A conveyance is not subject to forfeiture for a violation of §§ 5-64-419 and 5-64-441; and

(D) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission;

(5) Any book, record, or research product or material, including a formula, microfilm, tape, or data that is used, or intended for use, in violation of this chapter;

(6)(A) Anything of value, including firearms, furnished or intended to be furnished in exchange for a controlled substance or counterfeit substance in violation of this chapter, any proceeds or profits traceable to the exchange, and any money, negotiable instrument, or security used, or intended to be used, to facilitate any violation of this chapter.

(B) However, no property shall be forfeited under this subdivision (a)(6) to the extent of the interest of an owner by reason of any act or omission established by him or her, by a preponderance of the evidence, to have been committed or omitted without his or her knowledge or consent;



(7) REBUTTABLE PRESUMPTIONS.

(A) Any money, coin, currency, or firearms found in close proximity to a forfeitable controlled substance, a counterfeit substance, forfeitable drug manufacturing or distributing paraphernalia, or a forfeitable record of an importation, manufacture, or distribution of a controlled substance or counterfeit substance is presumed to be forfeitable under this subdivision (a)(7).

(B) The burden of proof is upon a claimant of the property to rebut this presumption by a preponderance of the evidence; and

(8) Real property may be forfeited under this chapter if it substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by this chapter, however:

(A) No real property is subject to forfeiture under this chapter by reason of any act or omission established by the owner of the real property by a preponderance of the evidence to have been committed or omitted without his or her knowledge or consent;

(B) Real property is not subject to forfeiture for a violation of § 5-64-419, if the offense is a Class C felony or less, or § 5-64-441;

(C) A forfeiture of real property encumbered by a mortgage or other lien is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the unlawful act or omission;

(D) Upon conviction, when the circuit court having jurisdiction over the real property seized finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this section, the court shall enter an order consistent with subsection (h) of this section;

(E) When any court orders a forfeiture of real property under this chapter, the order shall be filed of record on the day issued and shall have prospective effect only;

(F) A forfeiture of real property ordered under a provision of this chapter does not affect the title of a bona fide purchaser who purchased the real property prior to the issuance of the order, and the order has no force or effect on the title of the bona fide purchaser; and

(G) Any lis pendens filed in connection with any action pending under a provision of this chapter that might result in the forfeiture of real property is operative only from the time filed and has no retroactive effect.

(b) SEIZURE AND SUMMARY FORFEITURE OF CONTRABAND. The following items are deemed contraband and may be seized and summarily forfeited to the state:

(1) A controlled substance listed in Schedule I that is possessed, transferred, sold, or offered for sale in violation of this chapter and a controlled substance listed in Schedule I that is seized or comes into the possession of the state and the owner of the controlled substance is unknown;

(2)(A) A species of a plant from which a controlled substance in Schedule I, Schedule II, or Schedule VI may be derived and:

(i) The plant has been planted or cultivated in violation of this chapter;

(ii) The plant's owner or cultivator is unknown; or

(iii) The plant is a wild growth.

(B) Upon demand by a seizing law enforcement agency, the failure of a person in occupancy or in control of land or premises where the species of plant is growing or being stored, to produce an appropriate registration or proof that he or she is the holder of an appropriate registration, constitutes authority for the seizure and forfeiture of the plant; and

(3) Any drug paraphernalia or counterfeit substance except in the possession or control of a practitioner in the course of professional practice or research.

(c) SEIZURE OF PROPERTY. Property subject to forfeiture under this chapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the property on petition filed by the prosecuting attorney of the judicial circuit. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(3) The seizing law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The seizing law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(d) TRANSFER OF PROPERTY SEIZED BY STATE OR LOCAL AGENCY TO FEDERAL AGENCY.

(1) No state or local law enforcement agency may transfer any property seized by the state or local agency to any federal entity for forfeiture under federal law unless the circuit court having jurisdiction over the property enters an order, upon petition by the prosecuting attorney, authorizing the property to be transferred to the federal entity.

(2) The transfer shall not be approved unless it reasonably appears that the activity giving rise to the investigation or seizure involves more than one (1) state or the nature of the investigation or seizure would be better pursued under federal law.

(e) CUSTODY OF PROPERTY PENDING DISPOSITION.

(1) Property seized for forfeiture under this section is not subject to replevin, but is deemed to be in the custody of the seizing law enforcement agency subject only to an order or decree of the circuit court having jurisdiction over the property seized.

(2) Subject to any need to retain the property as evidence, when property is seized under this chapter the seizing law enforcement agency may:

(A) Remove the property to a place designated by the circuit court;

(B) Place the property under constructive seizure posting notice of pending forfeiture on it, by giving notice of pending forfeiture to its owners and interest holders, or by filing notice of pending forfeiture in any appropriate public record relating to the property;

(C) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, or is not needed for evidentiary purposes, deposit it in an interest-bearing account; or

(D) Provide for another agency or custodian, including an owner, secured party, mortgagee, or lienholder, to take custody of the property and service, maintain, and operate it as reasonably necessary to maintain its value in any appropriate location within the jurisdiction of the court.

(3)(A) In any case of transfer of property, a transfer receipt shall be prepared by the transferring agency.

(B) The transfer receipt shall:

(i) List a detailed and complete description of the property being transferred;

(ii) State to whom the property is being transferred and the source or authorization for the transfer; and

(iii) Be signed by both the transferor and the transferee.

(C) Both transferor and transferee shall maintain a copy of the transfer receipt.

(4) A person who acts as custodian of property under this section is not liable to any person on account of an act done in a reasonable manner in compliance with an order under this chapter.

(f) INVENTORY OF PROPERTY SEIZED — REFERRAL TO PROSECUTING ATTORNEY.

(1) Any property seized by a state or local law enforcement officer who is detached to, deputized or commissioned by, or working in conjunction with a federal agency remains subject to the provisions of this section.

(2)(A) When property is seized for forfeiture by a law enforcement agency, the seizing law enforcement officer shall prepare and sign a confiscation report.

(B)(i) The party from whom the property is seized shall also sign the confiscation report if present and shall immediately receive a copy of the confiscation report.

(ii) If the party refuses to sign the confiscation report, the confiscation report shall be signed by one (1) additional law enforcement officer, stating that the party refused to sign the confiscation report.

(C) The original confiscation report shall be:

(i) Filed with the seizing law enforcement agency within forty-eight (48) hours after the seizure; and

(ii) Maintained in a separate file.

(D) One (1) copy of the confiscation report shall be retained by the seizing law enforcement officer.

(3) The confiscation report shall contain the following information:



(A) A detailed description of the property seized including any serial or model numbers and odometer or hour reading of vehicles or equipment;

(B) The date of seizure;

(C) The name and address from whom the property was seized;

(D) The reason for the seizure;

(E) Where the property will be held;

(F) The seizing law enforcement officer's name; and

(G) A signed statement by the seizing law enforcement officer stating that the confiscation report is true and complete.

(4) Within three (3) business days of receiving the confiscation report, the seizing law enforcement agency shall forward a copy of the confiscation report to the prosecuting attorney for the district where the property was seized and to the Arkansas Drug Director.

(5)(A) Arkansas Legislative Audit shall notify the Arkansas Alcohol and Drug Abuse Coordinating Council and a circuit court in the county of a law enforcement agency, prosecuting attorney, or other public entity that the law enforcement agency, prosecuting attorney, or public entity is ineligible to receive any forfeited funds, forfeited property, or any grants from the council, if Arkansas Legislative Audit determines, by its own investigation or upon written notice from the Arkansas Drug Director, that:

(i) The law enforcement agency has failed to complete and file the confiscation reports as required by this section;

(ii) The law enforcement agency, prosecuting attorney, or public entity has not properly accounted for any seized property; or

(iii) The prosecuting attorney has failed to comply with the notification requirement set forth in subdivision (i)(1) of this section.

(B) After the notice, the circuit court shall not issue any order distributing seized property to that law enforcement agency, prosecuting attorney, or public entity nor shall any grant be awarded by the council to that law enforcement agency, prosecuting attorney, or public entity until:

(i) The appropriate officials of the law enforcement agency, prosecuting attorney, or public entity have appeared before the Legislative Joint Auditing Committee; and

(ii) The Legislative Joint Auditing Committee has adopted a motion authorizing subsequent transfers of forfeited property to the law enforcement agency, prosecuting attorney, or public entity.

(C)(i) While a law enforcement agency, prosecuting attorney, or other public entity is ineligible to receive forfeited property, the circuit court shall order any money that would have been distributed to that law enforcement agency, prosecuting attorney, or public entity to be transmitted to the Treasurer of State for deposit into the Crime Lab Equipment Fund.

(ii) If the property is other than cash, the circuit court shall order the property converted to cash pursuant to subdivision (h)(1)(B) of this section and the proceeds transmitted to the Treasurer of State for deposit into the Crime Lab Equipment Fund.

(D) Moneys deposited into the Crime Lab Equipment Fund pursuant to subdivision (f)(5)(C) of this section are not subject to recovery or retrieval by the ineligible law enforcement agency, prosecuting attorney, or other public entity.

(6) The Arkansas Drug Director shall establish through rules and regulations a standardized confiscation report form to be used by all law enforcement agencies with specific instructions and guidelines concerning the nature and dollar value of all property, including firearms, to be included in the confiscation report and forwarded to the office of the local prosecuting attorney and the Arkansas Drug Director under this subsection.

(g) INITIATION OF FORFEITURE PROCEEDINGS — NOTICE TO CLAIMANTS — JUDICIAL PROCEEDINGS.

(1)(A) The prosecuting attorney shall initiate forfeiture proceedings by filing a complaint with the circuit clerk of the county where the property was seized and by serving the complaint on all known owners and interest holders of the seized property in accordance with the Arkansas Rules of Civil Procedure.

(B) The complaint may be based on in rem or in personam jurisdiction but shall not be filed in such a way as to avoid the distribution requirements set forth in subdivision (i)(1) of this section.

(C) The prosecuting attorney shall mail a copy of the complaint to the Arkansas Drug Director within five (5) calendar days after filing the complaint.

(2)(A) The complaint shall include a copy of the confiscation report and shall be filed within sixty (60) days after receiving a copy of the confiscation report from the seizing law enforcement agency.

(B) In a case involving real property, the complaint shall be filed within sixty (60) days of the defendant's conviction on the charge giving rise to the forfeiture.

(3)(A) The prosecuting attorney may file the complaint after the expiration of the time set forth in subdivision (g)(2) of this section only if the complaint is accompanied by a statement of good cause for the late filing.

(B) However, in no event shall the complaint be filed more than one hundred twenty (120) days after either the date of the seizure or, in a case involving real property, the date of the defendant's conviction.

(C) If the circuit court determines that good cause has not been established, the circuit court shall order that the seized property be returned to the owner or interest holder. In addition, items seized but not subject to forfeiture under this section or subject to disposition pursuant to law or the Arkansas Rules of Criminal Procedure may be ordered returned to the owner or interest holder. If the owner or interest holder cannot be determined, the court may order disposition of the property in accordance with subsection (h) of this section.

(4) Within the time set forth in the Arkansas Rules of Civil Procedure, the owner or interest holder of the seized property shall file with the circuit clerk a verified answer to the complaint that shall include:

(A) A statement describing the seized property and the owner's or interest holder's interest in the seized property, with supporting documents to establish the owner's or interest holder's interest;

(B) A certification by the owner or interest holder stating that he or she has read the verified answer and that it is not filed for any improper purpose;

(C) A statement setting forth any defense to forfeiture; and

(D) The address at which the owner or interest holder will accept mail.

(5)(A) If the owner or interest holder fails to file an answer as required by subdivision (g)(4) of this section, the prosecuting attorney may move for default judgment pursuant to the Arkansas Rules of Civil Procedure.

(B)(i) If a timely answer has been filed, the prosecuting attorney has the burden of proving by a preponderance of the evidence that the seized property should be forfeited.

(ii) After the prosecuting attorney has presented proof under subdivision (g)(5)(B)(i) of this section, any owner or interest holder of the property seized is allowed to present evidence why the seized property should not be forfeited.

(iii)(a) If the circuit court determines that grounds for forfeiting the seized property exist and that no defense to forfeiture has been established by the owner or interest holder, the circuit court shall enter an order pursuant to subsection (h) of this section.

(b) However, if the circuit court determines either that the prosecuting attorney has failed to establish that grounds for forfeiting the seized property exist or that the owner or interest holder has established a defense to forfeiture, the court shall order that the seized property be immediately returned to the owner or interest holder.

(h) FINAL DISPOSITION.

(1) When the circuit court having jurisdiction over the seized property finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this chapter, the circuit court shall enter an order:

(A) To permit the law enforcement agency or prosecuting attorney to retain the seized property for law enforcement or prosecutorial purposes, subject to the following provisions:

(i)(a) Seized property may not be retained for official use for more than two (2) years, unless the circuit court finds that the seized property has been used for law enforcement or prosecutorial purposes and authorizes continued use for those purposes on an annual basis.

(b) At the end of the retention period, the seized property shall be sold as provided in subdivision (h)(1)(B) of this section and:

(1) Eighty percent (80%) of the proceeds shall be deposited into the



drug control fund of the retaining law enforcement agency or prosecuting attorney; and

(2) Twenty percent (20%) of the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund.

(c)(1) Nothing prohibits the retaining law enforcement agency or prosecuting attorney from selling the retained seized property at any time during the time allowed for retention.

(2) However, the proceeds of the sale shall be distributed as set forth in subdivision (h)(1)(A)(i)(b) of this section;

(ii) If the circuit court determines that retained seized property has been used for personal use or by non-law enforcement personnel for non-law enforcement purposes, the circuit court shall order the seized property to be sold pursuant to the provisions of § 5-5-101(e) and (f), and the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund;

(iii)(a) A drug task force may use forfeited property or money if the circuit court's order specifies that the forfeited property or money is forfeited to the prosecuting attorney, sheriff, chief of police, Department of Arkansas State Police, or Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department.

(b) After the order, the prosecuting attorney, sheriff, chief of police, Department of Arkansas State Police, or Arkansas Highway Police Division shall:

(1) Maintain an inventory of the forfeited property or money;

(2) Be accountable for the forfeited property or money; and

(3) Be subject to the provisions of subdivision (f)(5) of this section with respect to the forfeited property or money;

(iv)(a) Any aircraft is forfeited to the office of the Arkansas Drug Director and may only be used for drug eradication or drug interdiction efforts, within the discretion of the Arkansas Drug Director.

(b) However, if the Arkansas Alcohol and Drug Abuse Coordinating Council determines that the aircraft should be sold, the sale shall be conducted pursuant to the provisions of § 5-5-101(e) and (f), and the proceeds of the sale shall be deposited into the Special State Assets Forfeiture Fund;

(v) Any firearm not retained for official use shall be disposed of in accordance with state and federal law; and

(vi) Any controlled substance, plant, drug paraphernalia, or counterfeit substance shall be destroyed pursuant to a court order;

(B)(i) To sell seized property that is not required by law to be destroyed and that is not harmful to the public.

(ii) Seized property described in subdivision (h)(1)(B)(i) of this section shall be sold at a public sale by the retaining law enforcement agency or prosecuting attorney pursuant to the provisions of § 5-5-101(e) and (f); or

(C) To transfer a motor vehicle to a school district for use in a driver education course.

(2) Disposition of forfeited property pursuant to this subsection is subject to the need to retain the forfeited property as evidence in any related proceeding.

(3) Within three (3) business days of the entry of the order, the circuit clerk shall forward to the Arkansas Drug Director copies of the confiscation report, the circuit court's order, and any other documentation detailing the disposition of the seized property.

(i) DISPOSITION OF MONEYS RECEIVED. Subject to the provisions of subdivision (f)(5) of this section, the proceeds of sales conducted pursuant to subdivision (h)(1)(B) of this section and any moneys forfeited or obtained by judgment or settlement pursuant to this chapter shall be deposited and distributed in the manner set forth in this subsection. Moneys received from a federal forfeiture shall be deposited and distributed pursuant to subdivision (i)(4) of this section.

(1) ASSET FORFEITURE FUND.

(A) The proceeds of any sale and any moneys forfeited or obtained by judgment or settlement under this chapter shall be deposited into the asset forfeiture fund of the prosecuting attorney and is subject to the following provisions:

(i) If, during a calendar year, the aggregate amount of moneys deposited into the asset forfeiture fund exceeds twenty thousand dollars (\$20,000) per county, the prosecuting attorney shall, within fourteen (14) days of that time, notify the circuit judges in the judicial district and the Arkansas Drug Director;

(ii) Subsequent to the notification set forth in subdivision (i)(1)(A)(i) of this section, twenty percent (20%) of the proceeds of any additional sale and any additional moneys forfeited or obtained by judgment or settlement under this chapter in the same calendar year shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund, and the remainder shall be deposited into the asset forfeiture fund of the prosecuting attorney;

(iii) Failure by the prosecuting attorney to comply with the notification requirement set forth in subdivision (i)(1)(A)(i) of this section renders the prosecuting attorney and any entity eligible to receive forfeited moneys or property from the prosecuting attorney ineligible to receive forfeited moneys or property, except as provided in subdivision (f)(5)(A) of this section; and

(iv) Twenty percent (20%) of any moneys in excess of twenty thousand dollars (\$20,000) that have been retained but not reported as required by subdivision (i)(1)(A)(i) of this section are subject to recovery for deposit into the Crime Lab Equipment Fund.

(B) The prosecuting attorney shall administer expenditures from the asset forfeiture fund which is subject to audit by Arkansas Legislative Audit. Moneys distributed from the asset forfeiture fund shall only be used for law enforcement and prosecutorial purposes. Moneys in the asset forfeiture fund shall be distributed in the following order:

(i) For satisfaction of any bona fide security interest or lien;

(ii) For payment of any proper expense of the proceeding for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs;

(iii) Any balance under two hundred fifty thousand dollars (\$250,000) shall be distributed proportionally so as to reflect generally the contribution of the appropriate local or state law enforcement or prosecutorial agency's participation in any activity that led to the seizure or forfeiture of the property or deposit of moneys under this chapter; and

(iv) Any balance over two hundred fifty thousand dollars (\$250,000) shall be forwarded to the Arkansas Drug Director to be transferred to the State Treasury for deposit into the Special State Assets Forfeiture Fund for distribution as provided in subdivision (i)(3) of this section.

(C)(i) For a forfeiture in an amount greater than two hundred fifty thousand dollars (\$250,000) from which expenses are paid for a proceeding for forfeiture and sale under subdivision (i)(1)(B)(ii) of this section, an itemized accounting of the expenses shall be delivered to the Arkansas Drug Director within ten (10) calendar days after the distribution of the funds.

(ii) The itemized accounting shall include the expenses paid, to whom paid, and for what purposes the expenses were paid.

**(2) DRUG CONTROL FUND.**

(A)(i) There is created on the books of law enforcement agencies and prosecuting attorneys a drug control fund.

(ii) The drug control fund shall consist of any moneys obtained under subdivision (i)(1) of this section and any other revenue as may be provided by law or ordinance.

(iii) Moneys from the drug control fund may not supplant other local, state, or federal funds.

(iv) Moneys in the drug control fund are appropriated on a continuing basis and are not subject to the Revenue Stabilization Law, § 19-5-101 et seq.

(v) Moneys in the drug control fund shall only be used for law enforcement and prosecutorial purposes.

(vi) The drug control fund is subject to audit by Arkansas Legislative Audit.

(B) The law enforcement agencies and prosecuting attorneys shall submit to the Arkansas Drug Director on or before January 1 and July 1 of each year a report detailing any moneys received and expenditure made from the drug control fund during the preceding six-month period.

**(3) SPECIAL STATE ASSETS FORFEITURE FUND.**

(A) There is created and established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State a fund to be known as the "Special State Assets Forfeiture Fund".



(B)(i) The Special State Assets Forfeiture Fund shall consist of revenues obtained under subdivision (i)(1)(B)(iv) of this section and any other revenue as may be provided by law.

(ii) Moneys from the Special State Assets Forfeiture Fund may not supplant other local, state, or federal funds.

(C) The Special State Assets Forfeiture Fund is not subject to the provisions of the Revenue Stabilization Law, § 19-5-101 et seq., or the Special Revenue Fund Account of the State Apportionment Fund, § 19-5-203(b)(2)(A).

(D)(i) The Arkansas Drug Director shall establish through rules and regulations a procedure for proper investment, use, and disposition of state moneys deposited into the Special State Assets Forfeiture Fund in accordance with the intent and purposes of this chapter.

(ii) State moneys in the Special State Assets Forfeiture Fund shall be distributed by the Arkansas Alcohol and Drug Abuse Coordinating Council and shall be distributed for drug interdiction, eradication, education, rehabilitation, the State Crime Laboratory, and drug courts.

(4) FEDERAL FORFEITURES.

(A)(i)(a) Any moneys received by a prosecuting attorney or law enforcement agency from a federal forfeiture shall be deposited and maintained in a separate account.

(b) However, any balance over two hundred fifty thousand dollars (\$250,000) shall be distributed as set forth in subdivision (i)(4)(B) of this section.

(ii) No other moneys may be maintained in the account except for any interest income generated by the account.

(iii) Moneys in the account shall only be used for law enforcement and prosecutorial purposes consistent with governing federal law.

(iv) The account is subject to audit by Arkansas Legislative Audit.

(B)(i) Any balance over two hundred fifty thousand dollars (\$250,000) shall be forwarded to the Department of Arkansas State Police to be transferred to the State Treasury for deposit into the Special State Assets Forfeiture Fund in which it shall be maintained separately and distributed consistent with governing federal law and upon the advice of the Arkansas Alcohol and Drug Abuse Coordinating Council.

(ii) Of the moneys contained in the Special State Assets Forfeiture Fund at the beginning of each fiscal year, no more than:

(a) Twenty-five percent (25%) shall be retained by the Department of Arkansas State Police to be used for law enforcement purposes consistent with governing federal law; and

(b) Sixty-five percent (65%) may be distributed among other state and local law enforcement agencies to be used for law enforcement purposes consistent with federal law.

(iii) With the advice of the Arkansas Alcohol and Drug Abuse Coordinating Council, the Department of Arkansas State Police shall promulgate rules and procedures for the distribution by an allocation

formula of moneys set forth in subdivision (i)(4)(B)(ii)(b) of this section.

(j) IN PERSONAM PROCEEDINGS. In personam jurisdiction may be based on a person's presence in the state, or on his or her conduct in the state, as set out in § 16-4-101(C), and is subject to the following additional provisions:

(1) A temporary restraining order under this section may be entered ex parte on application of the state, upon a showing that:

(A) There is probable cause to believe that the property with respect to which the order is sought is subject to forfeiture under this section; and

(B) Notice of the action would jeopardize the availability of the property for forfeiture;

(2)(A) Notice of the entry of a temporary restraining order and an opportunity for hearing shall be afforded to a person known to have an interest in the property.

(B) The hearing shall be held at the earliest possible date consistent with Rule 65 of the Arkansas Rules of Civil Procedure and is limited to the issues of whether:

(i) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the temporary restraining order will result in the property's being destroyed, conveyed, alienated, encumbered, disposed of, received, removed from the jurisdiction of the circuit court, concealed, or otherwise made unavailable for forfeiture; and

(ii) The need to preserve the availability of property through the entry of the requested temporary restraining order outweighs the hardship on any owner or interest holder against whom the temporary restraining order is to be entered;

(3) The state has the burden of proof by a preponderance of the evidence to show that the defendant's property is subject to forfeiture;

(4)(A) On a determination of liability of a person for conduct giving rise to forfeiture under this section, the circuit court shall enter a judgment of forfeiture of the property subject to forfeiture as alleged in the complaint and may authorize the prosecuting attorney or any law enforcement officer to seize any property subject to forfeiture pursuant to subsection (a) of this section not previously seized or not then under seizure.

(B) The order of forfeiture shall be consistent with subsection (h) of this section.

(C) In connection with the judgment, on application of the state, the circuit court may enter any appropriate order to protect the interest of the state in property ordered forfeited; and

(5) Subsequent to the finding of liability and order of forfeiture, the following procedures apply:

(A) The attorney for the state shall give notice of pending forfeiture, in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure, to any owner or interest holder who has not previously been given notice;

(B) An owner of or interest holder in property that has been ordered forfeited and whose claim is not precluded may file a claim within thirty (30) days after initial notice of pending forfeiture or after notice under Rule 4 of the Arkansas Rules of Civil Procedure, whichever is earlier; and

(C) The circuit court may amend the in personam order of forfeiture if the circuit court determines that a claimant has established that he or she has an interest in the property and that the interest is exempt under subdivision (a)(4), subdivision (a)(6), or subdivision (a)(8) of this section.

(k) The circuit court shall order the forfeiture of any other property of a claimant or defendant up to the value of the claimant's or defendant's property found by the circuit court to be subject to forfeiture under subsection (a) of this section if any of the forfeitable property had remained under the control or custody of the claimant or defendant and:

(1) Cannot be located;

(2) Was transferred or conveyed to, sold to, or deposited with a third party;

(3) Is beyond the jurisdiction of the circuit court;

(4) Was substantially diminished in value while not in the actual physical custody of the seizing law enforcement agency;

(5) Was commingled with other property that cannot be divided without difficulty; or

(6) Is subject to any interest exempted from forfeiture under this subchapter.

(1)(1)(A) On the fifth day of each month the Treasurer of State shall transfer to the Department of Community Correction Fund Account twenty percent (20%) of any moneys deposited into the Special State Assets Forfeiture Fund during the previous month.

(B) However, in no event shall more than eight hundred thousand dollars (\$800,000) be transferred during any one (1) fiscal year.

(2) Any moneys transferred to the Department of Community Correction Fund Account from the Special State Assets Forfeiture Fund in accordance with this subsection shall:

(A) Be used for the personal services and operating expenses of the drug courts and for no other purpose; and

(B) Not be transferred from the Department of Community Correction Fund Account.

**History.** Acts 1971, No. 590, Art. 5, § 5; 1977, No. 334, § 1; 1981, No. 78, § 3; 1981, No. 863, §§ 1, 2; 1983, No. 787, §§ 7, 8; 1985, No. 1074, § 1; A.S.A. 1947, § 82-2629; Acts 1989, No. 252, §§ 1, 2; 1989 (3rd Ex. Sess.), No. 87, §§ 1, 2, 4; 1991, No. 573, § 1; 1991, No. 1050, § 1; 1999, No. 1120, § 2; 2001, No. 1495, § 2; 2001, No. 1690, §§ 1, 2; 2003, No. 1447, § 1; 2005, No. 1994, § 310; 2005, No. 2245, § 1; 2007, No. 493, §§ 1-3; No. 827,

§ 65; No. 830, § 1; 2009, No. 699, § 1; 2011, No. 570, §§ 67, 68.

**A.C.R.C. Notes.** Acts 1991, No. 573, § 2, provided: "It is the express intent of this Act to create in personam jurisdiction for personal property in forfeiture proceedings. This type of jurisdiction has been authorized through legislation in several states. See, e.g., Arizona Revised Statutes Annotated Sections 13-4301 to -4315; and Louisiana Revised Statutes



Sections 40:2601 to 40:2622. See also the Model Asset Seizure and Forfeiture Act prepared by the American Prosecutors Research Institute's National Drug Prosecution Center."

Acts 1999, No. 1120, § 1, provided: "Legislative intent. As stated in the comment to section 505 of the Uniform Controlled Substances Act, 'Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances and to deprive the drug trafficker of needed mobility.' The General Assembly recognizes the importance of asset forfeiture as a means to confront drug trafficking. However, the General Assembly also recognizes that under the system that existed prior to the enactment of this act, the lack of uniformity and accountability in forfeiture procedures across the state has undermined confidence in the system. As the United States Supreme Court has stated, 'Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly.' In order to alleviate the problems resulting from the lack of uniformity and accountability, the General Assembly has determined that time limits for initiating forfeiture proceedings and stricter controls over forfeited property will help alleviate such problems while strengthening forfeiture as a vital weapon against drug trafficking. Specifically, it is the intent of § 5-64-505(a) that there be no forfeitures based solely upon a misde-

meanor possession of a controlled substance. However, if the prosecuting attorney can prove that other evidence exists to establish a basis for forfeiture, the property may be forfeited. It is the intent of § 5-64-505(d) to reduce the conflict between state and federal authorities over seizures executed by state law enforcement officers. It is the intent of § 5-64-505(h) to allow law enforcement agencies and drug task forces to maintain forfeited property for official use, provided that the final order disposing of such property defines the legal entity that is responsible for such property. Section 5-64-505(i)(1)(D) governs those situations in which a seizure results in the forfeiture of money and or property in excess of two hundred fifty thousand dollars (\$250,000). It is the specific intent of the General Assembly that forfeiture proceedings not be structured in such a way as to defeat the General Assembly's intent that money or property in excess of two hundred fifty thousand dollars (\$250,000) be transferred to the Special State Assets Forfeiture Fund. It is determined that such fund can best be used to combat drug trafficking statewide."

Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

**Amendments.** The 2011 amendment substituted "subdivisions (a)(1) or (a)(2)" for "subdivision (a)(1) or (2)" in (a)(4) and (a)(4)(B)(ii); substituted "§§ 5-64-419 and 5-64-441" for "§ 5-64-401(c)" in (a)(4)(C); and substituted "§ 5-64-419, if the offense is a Class C felony or less, or § 5-64-441" for "§ 5-64-401(c)" in (a)(8)(B).

## RESEARCH REFERENCES

**ALR.** Burden of proof and presumptions in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law. 104 A.L.R.5th 229.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law — Proximity of asset to drugs, paraphernalia, or records. 115 A.L.R.5th 403.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law — Odor of drugs. 116 A.L.R.5th 325.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law — Explanation or lack thereof. 4 A.L.R.6th 113.

Evidence Considered in Tracing Cur-

rency, Bank Account, or Cash Equivalent to Illegal Drug Trafficking so as to Permit Forfeiture, or Declaration as Contraband, Under State Law — Amount and Packaging of Money and Drugs. 34 A.L.R.6th 539.

Evidence Considered in Tracing Currency, Bank Account, or Cash Equivalent to Illegal Drug Trafficking so as to Permit Forfeiture, or Declaration as Contraband, Under State Law — Factors Other than Proximity, Explanation, Amount, Packaging, and Odor. 101 A.L.R.6th 1 (2015).

**Ark. L. Rev.** Recent Developments: Forfeiture — “Close Proximity” Test, 59 Ark. L. Rev. 511.

**U. Ark. Little Rock L.J.** Legislation of the 1983 General Assembly, Criminal Law, 6 U. Ark. Little Rock L.J. 613.

Arkansas Law Survey, Antley, Criminal Law, 9 U. Ark. Little Rock L.J. 119.

Survey, Criminal Law, 12 U. Ark. Little Rock L.J. 617.

Survey — Criminal Law, 14 U. Ark. Little Rock L.J. 753.

**U. Ark. Little Rock L. Rev.** Annual Survey of Caselaw, Property Law, 26 U. Ark. Little Rock L. Rev. 965.

## CASE NOTES

### ANALYSIS

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### Constitutionality.

Acts 1981, No. 78, which criminalized the possession, use, sale and manufacture of drug paraphernalia, is not unconstitutionally overbroad even though the act may prevent persons from utilizing the expressions imprinted on, or the symbolic speech represented by the use of, drug paraphernalia. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

It was not a violation of the Double Jeopardy Clause to require defendant to forfeit his money after he had been sentenced for the same criminal offense which occasioned the forfeiture. *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996).

### Construction.

Because this section is penal in nature and because forfeitures are not favorites of the law, it is interpreted narrowly. *Beebe v. State*, 298 Ark. 119, 765 S.W.2d 943 (1989).

An in rem civil forfeiture action under this section, against the cash defendant had on his person when he was arrested for a drug offense to which he pled guilty, was a remedial civil sanction, not a criminal penalty, for purposes of the Double Jeopardy Clause. *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996).

This section effected a repeal by implication of § 24-11-415 in drug trafficking cases; when the seized personal property results from drug trafficking, provisions of this section control and the proceeds under \$250,000 resulting from the forfeiture sales must be distributed into the Drug Control Funds. *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997).

The federal forfeiture statute, 21 U.S.C. § 881, is substantially similar to § 5-64-505, and cases decided under the federal statute are instructive with regard to the types of proof accepted by courts in civil forfeiture actions. In re *Three Pieces of Prop. Located in Monticello*, 81 Ark. App. 235, 100 S.W.3d 76 (2003).

Fact that a controlled substance is residue, rather than a “usable amount,” does not make the rebuttable presumption in subdivision (a)(6) (now (a)(7)) of this section inapplicable. *\$15,956 in United States Currency v. State*, 366 Ark. 70, 233 S.W.3d 598 (2006).



Because the forfeiture statute is penal in nature, and forfeitures are not favorites of the law, the statute is construed narrowly on appeal. *Ridenhour v. State*, 98 Ark. App. 116, 250 S.W.3d 566 (2007).

### **Purpose.**

The clear intent behind this section is to provide additional tools to confront drug trafficking. *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997).

### **Any Other Property.**

The words “any other property” used in subsection (o) (now (k)) mean additional property of any kind owned by the defendant. *State v. Gray*, 322 Ark. 301, 908 S.W.2d 642 (1995).

Under subsection (o) (now (k)), the state may proceed to seek forfeiture of “any other assets,” even though they are not connected to the underlying crime, when forfeitable assets used in the underlying crime are unreachable under the provisions of subdivision (a)(4)(iv) (now (a)(4)(D)). *State v. Gray*, 322 Ark. 301, 908 S.W.2d 642 (1995).

### **Burden of Proof.**

After the State met its burden to prove that the operator of a motor vehicle possessed and sold illegal drugs while using the vehicle, the owner of the vehicle, in order to obtain its return, was required to show both that the forfeitable acts occurred without her knowledge or consent and, as it was determined that the operator had the owner’s permission to use the vehicle, that the forfeitable acts occurred without the knowledge or consent of the operator. *State v. One 1993 Toyota Camry*, 333 Ark. 503, 969 S.W.2d 663 (1998).

In a case concerning the forfeiture of two vehicles, the State did not have to offer proof that oxycodone and methadone were controlled substances since the court could take judicial notice of state-agency regulations classifying controlled substances into particular schedules. *King v. State*, 2014 Ark. App. 554, 447 S.W.3d 126 (2014).

### **Close Proximity.**

“In close proximity” as used in subdivision (a)(6) (now (a)(7)) concerning rebuttable presumptions means “very near” and will be determined on a case-by-case basis and not by reference to any rigid rule. *Limon v. State*, 285 Ark. 166, 685 S.W.2d 515 (1985).

Preponderance of the evidence in a forfeiture proceeding placed money in close proximity to controlled substances or drug paraphernalia. *Limon v. State*, 285 Ark. 166, 685 S.W.2d 515 (1985); *Kaiser v. State*, 24 Ark. App. 19, 746 S.W.2d 559 (1988), rev’d on other grounds, *Kaiser v. State*, 296 Ark. 125, 752 S.W.2d 271 (1988).

Forfeiture of a large amount of cash found in a vehicle was proper as the rebuttable presumption in subdivision (a)(6) (now (a)(7)) of this section applied, even though only residue of a controlled substance was found; moreover, the cash was in close proximity to drugs found in a second vehicle that was traveling in tandem. \$15,956 in United States Currency v. *State*, 366 Ark. 70, 233 S.W.3d 598 (2006).

Forfeiture of firearms that were seized during a search of defendant’s house with respect to the manufacture of methamphetamine was proper under this section, as the evidence supported the conclusion that all of the firearms were “in close proximity” to the drug paraphernalia. In re *Gaucha-IGA 12 Gauge*, 2011 Ark. App. 591 (2011).

### **Conveyances.**

Where there was no proof that the mobile home had ever been used as a conveyance of a controlled substance, the mobile home was not a vehicle within the meaning of subdivision (a)(4) of this section. *Gallia v. State*, 287 Ark. 176, 697 S.W.2d 108 (1985).

Where there was no evidence that defendant’s truck was being used to transport the controlled substance for the purpose of sale or receipt, forfeiture was inappropriate. *Burnett v. State*, 51 Ark. App. 144, 912 S.W.2d 441 (1995).

Trial court erred in ordering the forfeiture of appellant’s truck pursuant to a complaint filed by the State of Arkansas where appellant’s mere possession of marijuana did not satisfy the requirements set forth in this section; the State failed to establish that the truck was being used to transport marijuana for the purpose of sale or receipt. *Ridenhour v. State*, 98 Ark. App. 116, 250 S.W.3d 566 (2007).

Mere possession of a controlled substance does not satisfy the requirements set forth in the civil forfeiture statute. *Ridenhour v. State*, 98 Ark. App. 116, 250 S.W.3d 566 (2007).



While a map in defendant's truck did not establish that the truck was used to transport marijuana in violation of subdivision (a)(4) of this section, defendant's car smelled of raw marijuana and 28 pounds of marijuana were found in a nearby house, and therefore the car was properly forfeited as a "container" under subdivision (a)(4). *Trotter v. State*, 2011 Ark. App. 696 (2011).

### **Criminal Proceeding.**

Where the State brought the forfeiture action against defendant's vehicle under the in rem portion of this section, the forfeiture action was civil in nature, did not constitute "punishment" for purposes of double jeopardy, and did not bar defendant's subsequent prosecution on charges of possession of a controlled substance. *State v. Rice*, 329 Ark. 219, 947 S.W.2d 3 (1997).

### **Evidence.**

Testimony by an undercover agent that the controlled substance he bought from the defendant was transported in the defendant's automobile, and the judgment of the defendant's conviction, held sufficient to support a finding that the automobile should be forfeited. *Reding v. State*, 277 Ark. 288, 641 S.W.2d 24 (1982).

Where there is joint occupancy of premises, mere occupancy is insufficient to convict one of possession of contraband unless there are additional factors linking the defendant with the contraband. *Kandur v. State*, 20 Ark. App. 194, 726 S.W.2d 682 (1987).

Where money was found while the police were searching defendant's home under authority of an invalid search warrant, the money could not be confiscated, at least where the only evidence was obtained pursuant to the invalid warrant. *Kandur v. State*, 20 Ark. App. 194, 726 S.W.2d 682 (1987).

If police officers have not developed a reasonable suspicion of defendant based on the reliability of an informant, seizures resulting from the stop of a car cannot stand and neither can the forfeitures. *Kaiser v. State*, 296 Ark. 125, 752 S.W.2d 271 (1988).

Where the marijuana sale took place in defendant's truck, evidence was sufficient to show that the truck was used to contain or transport marijuana. *Lewis v. State*, 309 Ark. 392, 831 S.W.2d 145 (1992).

Officer's testimony that two pounds of marijuana were found in a truck supported trial court's finding that truck was being used to transport marijuana and was, therefore, subject to forfeiture. *Davison v. State*, 38 Ark. App. 137, 831 S.W.2d 160 (1992).

Testimony supported trial court's finding that gun was being used in the delivery of marijuana, and was subject to forfeiture. *Davison v. State*, 38 Ark. App. 137, 831 S.W.2d 160 (1992).

The trial court erred when it refused to order forfeiture of a car where (1) the person in possession of the car, who was the son of the owners of the car, purchased a pound of marijuana from an informant in a reverse sting operation, and (2) the son of the owners had their permission to use the car. In re *One 1994 Chevrolet Camaro*, 343 Ark. 751, 37 S.W.3d 613 (2001).

In a forfeiture proceeding involving a truck parked outside a residence containing methamphetamine laboratories, a piece of drug paraphernalia found in the truck describing the drug dealer's accounting method was insufficient to show that the truck has been used to transport drugs. *1993 Ford Pick-Up v. State*, 88 Ark. App. 172, 196 S.W.3d 493 (2004).

### **Forfeiture Proceeding.**

A forfeiture is an in rem civil proceeding, independent of the criminal charge and to be decided by a preponderance of the evidence. *Reddin v. State*, 15 Ark. App. 399, 695 S.W.2d 394 (1985).

Where no motion was filed by an opposing party pursuant to Ark. R. Civ. P. 55 to set aside two default judgments, the trial court lacked the authority to set aside the default judgment and entered an order forfeiting the property to the county general fund. *State v. \$258,035.00 United States Currency*, 352 Ark. 117, 98 S.W.3d 818 (2003).

### **Knowledge or Consent.**

Exception to forfeiture based on a lack of knowledge or consent was not addressed on appeal as it was raised for the first time in a reply brief; even if it had been addressed, it was unavailing because one owner's actions were enough to divest the other owner of her interest under the forfeiture statute. *King v. State*, 2014 Ark. App. 554, 447 S.W.3d 126 (2014).

**Presumption.**

Drug-dog alert on a non-controlled-substance item does not constitute “a forfeitable controlled substance” sufficient to employ the rebuttable presumption in a forfeiture case. Therefore, money found in a passenger’s gym bag during a vehicle stop was not subject to forfeiture where no drugs or drug paraphernalia were found, and a drug dog alerted to the money. *United States Currency in the Amount of \$70,000 v. State*, 2014 Ark. App. 127 (2014).

**Property Rights.**

Private property enjoys no constitutional privilege under Ark. Const., Art. 2, § 22 when it is knowingly used to traffic in drugs. *One 1982 Datsun 280ZX v. Bentley ex rel. North Little Rock Police Dep’t*, 285 Ark. 121, 685 S.W.2d 498 (1985).

The \$2000 defendant paid an agent for drugs, which had been retained as evidence, was subject to seizure and forfeiture under this section, but because no forfeiture action was initiated, the defendant was entitled to return of the money. *Drug Task Force v. Hoffman*, 353 Ark. 182, 114 S.W.3d 213 (2003).

**Requirements.**

In a forfeiture proceeding, a claimant failed to present documentation that established her ownership of a scanner and a digital camera in compliance with this section. However, the state failed to show that a computer was properly forfeited as the only evidence it offered that it was used to buy a controlled substance was inadmissible hearsay. *Gregory v. State*, 2011 Ark. App. 131, 381 S.W.3d 168 (2011).

**Seizing Agency.**

Though not specifically defined in the statute, it is apparent from the context that police, rather than prosecutors, are contemplated by the term “seizing law enforcement agency.” *Ark. Hwy. Police v. Crittenden County Prosecuting Atty’s Office*, 337 Ark. 74, 987 S.W.2d 663, cert. denied, 528 U.S. 877, 120 S. Ct. 185, 145 L. Ed. 2d 155 (1999).

Where the Arkansas Highway Police seized money from a truck and the Drug Enforcement Agency subsequently adopted the seizure pursuant to federal forfeiture law, a state, rather than federal, seizure occurred and the money remained

under the jurisdiction of the circuit court. *Ark. Hwy. Police v. Crittenden County Prosecuting Atty’s Office*, 337 Ark. 74, 987 S.W.2d 663, cert. denied, 528 U.S. 877, 120 S. Ct. 185, 145 L. Ed. 2d 155 (1999).

County sheriff’s office, although the seizing agency, was not a party to a forfeiture action brought by a prosecutor under this section, and therefore service by the sheriff on the owners of the property to be forfeited was not deficient under Ark. R. Civ. P. 4(c)(1). *State v. Hammame*, 102 Ark. App. 87, 282 S.W.3d 278 (2008).

**Seizure Upheld.**

Trial court order directing the forfeiture of three homes to the State under the provisions of this section was affirmed where the evidence showed that a husband and wife held the properties either in joint name or the wife’s name alone, that both the husband and wife were convicted of offenses in violation of the Arkansas Uniform Controlled Substances Act, that over \$300,000, drugs, drugs paraphernalia and records consistent with drug trafficking activities were found in one of the homes, and that the homes were purchased after the owners began their drug trafficking activities; however, an equitable lien granted by the trial court to the wife’s mother on one of the homes based on the mother’s having paid off the mortgage on one of the properties was voided because the mother acted after the property was subject to a temporary restraining order and *lis pendens* and the mother could not be a good faith purchaser without notice. *In re Three Pieces of Prop. Located in Monticello*, 81 Ark. App. 235, 100 S.W.3d 76 (2003).

Forfeiture of an owner’s vehicle was supported by a preponderance of the evidence because over \$5,000 in cash was seized from the owner’s husband during a traffic stop, he had marijuana in a plastic bag in his shirt pocket, and his explanation for the money was contradictory. Moreover, the husband was driving around late on a Sunday night, and most of the money in his possession was in smaller bills. *Walker v. State*, 2013 Ark. App. 437 (2013).

In a case concerning the forfeiture of two vehicles, although one owner legally obtained controlled substances, his sale of them thereafter constituted a violation of the law prohibiting the dispensing of con-



trolled substances without a written prescription. *King v. State*, 2014 Ark. App. 554, 447 S.W.3d 126 (2014).

**Time of Filing.**

Where truck was seized three months before forfeiture proceedings were instituted under this section, the statutory requirement of promptness was satisfied. *Lewis v. State*, 309 Ark. 392, 831 S.W.2d 145 (1992) (decided under former version of statute).

Trial court erred in granting state's motion to strike appellant's motion to dismiss a forfeiture action because the forfeiture action was properly commenced on October 13, 2004, and the record indicated that the confiscation report was received on April 1, 2003, clearly beyond the 60 days required by this section. *Mitchell v. State*, 94 Ark. App. 304, 229 S.W.3d 583 (2006).

**Verification.**

Pursuant to Ark. R. Civ. P. 11(a) and subdivision (g)(4) of this section, a party in a civil forfeiture action is required to give a personal verification; therefore, a default judgment was properly entered for the state in a case where an owner's answer was merely signed by his attorney. *Solis v. State*, 371 Ark. 590, 269 S.W.3d 352 (2007).

Ark. R. Civ. P. 4(b) lays out with great

specificity the requirements for a proper summons, but nowhere does the rule require or even suggest that the summons must describe all of the requirements for a valid answer. Therefore, in a civil forfeiture action, a summons was not invalid because it failed to state the verification requirements for an answer under subdivision (g)(4) of this section. *Solis v. State*, 371 Ark. 590, 269 S.W.3d 352 (2007).

A state was entitled to a default judgment in its forfeiture proceedings against \$1,814 seized from an arrestee in connection with his arrest on two counts of delivery of a controlled substance because the arrestee's answer was not verified by his signature as required by subdivision (g)(4) of this section, and the arrestee's arguments were the same as those rejected by the court in earlier forfeiture proceedings against the arrestee's truck. *Solis v. State*, 373 Ark. 255, 283 S.W.3d 190 (2008).

**Cited:** *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978); *Little Rock Police Dep't ex rel. Munson v. One 1977 Lincoln Continental Mark V*, 265 Ark. 512, 580 S.W.2d 451 (1979); *Murray v. State*, 275 Ark. 46, 628 S.W.2d 549 (1982); *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992); *Harris v. State*, 41 Ark. App. 207, 850 S.W.2d 41 (1993); *Corbit v. State*, 334 Ark. 592, 976 S.W.2d 927 (1998).

**5-64-506. Burden of proof — Liability of officers.**

(a)(1) It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter.

(2) The burden of proof of any exemption or exception is upon the person claiming it.

(b)(1) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this chapter, he or she is presumed not to be the holder of the registration or order form.

(2) The burden of proof is upon him or her to rebut the presumption.

(c) No liability is imposed by this chapter upon any authorized state, county, or municipal officer engaged in the lawful performance of his or her duties.

**History.** Acts 1971, No. 590, Art. 5, § 6; A.S.A. 1947, § 82-2630; Acts 2005, No. 1994, § 311.



## RESEARCH REFERENCES

**ALR.** Burden of proof and presumptions in tracing currency, bank account, or cash equivalent to illegal drug trafficking

so as to permit forfeiture, or declaration as contraband, under state law. 104 A.L.R.5th 229.

## CASE NOTES

**Exemption from Act.**

Defendant had burden of showing he was exempt from act and authorized to deliver controlled substance and state need not negate the exemption. *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974).

In adopting this section which specifically exempts state officers from liability under the Uniform Controlled Substances

Act when engaged in the performance of their duties, the legislature clearly recognized the possible need of law enforcement officials to utilize real drugs during the course of undercover sting operations. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000).

**Cited:** *Rogers v. State*, 258 Ark. 314, 524 S.W.2d 227 (1975); *Garner v. State*, 258 Ark. 321, 524 S.W.2d 223 (1975).

**5-64-507. Conclusiveness of findings.**

(a) Any final determination, finding, or conclusion of the Director of the Department of Health under this chapter is a final and conclusive decision of the matter involved.

(b) Any person aggrieved by the decision may obtain review of the decision in the circuit court of the county.

(c) If supported by substantial evidence, a finding of fact by the director is conclusive.

**History.** Acts 1971, No. 590, Art. 5, § 7; A.S.A. 1947, § 82-2631; Acts 2005, No. 1994, § 311.

**5-64-508. Prevention and deterrence — Educational and research programs.**

(a) The Division of Behavioral Health Services shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs the division may:

(1) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(3) Consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(4) Evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(5) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them; and

(6) Assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(b) The division shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this chapter, the division may:

(1) Establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) Make studies and undertake programs of research to:

(A) Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this chapter;

(B) Determine patterns of misuse and abuse of controlled substances and the social effects of misuse and abuse of controlled substances; and

(C) Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(3) Enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects that bear directly on misuse and abuse of controlled substances.

(c) The division may enter into contracts for educational and research activities without performance bonds.

(d)(1) The Director of the Department of Health may authorize a person engaged in research on the use and effects of a controlled substance to withhold the names and other identifying characteristics of individuals who are the subjects of the research.

(2) A person who obtains this authorization shall not be compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(e)(1) The director may authorize the possession and distribution of a controlled substance by a person engaged in research.

(2) A person who obtains this authorization is exempt from state prosecution for possession and distribution of a controlled substance to the extent of the authorization.

**History.** Acts 1971, No. 590, Art. 5, § 8; 1979, No. 898, § 15; A.S.A. 1947, § 82-2632; Acts 2005, No. 1994, § 311; 2007, No. 827, § 66; 2013, No. 1107, § 2.

**Amendments.** The 2013 amendment

substituted “Division of Behavioral Health Services” for “Director of the Office of Alcohol and Drug Abuse Prevention” throughout the section; and substituted “the division” for “he or she” in (a) and (b).

## CASE NOTES

**Cited:** *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996).

**5-64-509. [Repealed.]**

**Publisher's Notes.** This section, concerning uncontested forfeitures, was repealed by Acts 1999, No. 1120, § 4. The section was derived from Acts 1991, No. 859, § 1.

**5-64-510. Methamphetamine-contaminated motor vehicles.**

(a) As used in this section, "methamphetamine-contaminated motor vehicle" means a motor vehicle that has been forfeited under § 5-64-505 in which methamphetamine was manufactured as determined by a law enforcement agency or a prosecuting attorney who has possession of the motor vehicle.

(b) A law enforcement agency or a prosecuting attorney who has possession of a methamphetamine-contaminated motor vehicle shall destroy or sell for scrap metal the methamphetamine-contaminated motor vehicle.

**History.** Acts 2009, No. 776, § 1.

## SUBCHAPTER 6 — UNIFORM CONTROLLED SUBSTANCES ACT — MISCELLANEOUS

SECTION.

5-64-601 — 5-64-608. [Repealed.]

**5-64-601 — 5-64-608. [Repealed.]**

**Publisher's Notes.** This subchapter was repealed by Acts 2005, No. 1994, § 548. The subchapter was derived from the following sources:

5-64-601. Acts 1971, No. 590, Art. 6, § 1; A.S.A. 1947, § 82-2633.

5-64-602. Acts 1971, No. 590, Art. 6, § 2; A.S.A. 1947, § 82-2634.

5-64-603. Acts 1971, No. 590, Art. 6, § 3; A.S.A. 1947, § 82-2635.

5-64-604. Acts 1971, No. 590, Art. 6, § 4; A.S.A. 1947, § 82-2636.

5-64-605. Acts 1971, No. 590, Art. 6, § 7; A.S.A. 1947, § 82-2638n.

5-64-606. Acts 1971, No. 590, Art. 6, § 8; A.S.A. 1947, § 82-2638n.

5-64-607. Acts 1971, No. 590, Art. 6, § 9; A.S.A. 1947, § 82-2638n.

5-64-608. Acts 1971, No. 590, Art. 6, § 5; 1979, No. 898, § 20; 1983, No. 511, § 12; A.S.A. 1947, § 82-2637.

## SUBCHAPTER 7 — PROVISIONS RELATING TO THE UNIFORM CONTROLLED SUBSTANCES ACT

SECTION.

5-64-701. [Repealed.]

5-64-702. Promulgation of rules and

SECTION.

regulations.

5-64-703. Authority to make inspections.



SECTION.

- 5-64-704. Consent to inspection.
- 5-64-705. Authority to investigate and arrest in contiguous county.
- 5-64-706. Grant of immunity.
- 5-64-707. Admissibility of drug analysis — Cross-examination.

SECTION.

- 5-64-708. Local funding for undercover work.
- 5-64-709. [Repealed.]
- 5-64-710. Denial of driving privileges for minor — Restricted permit.

**Effective Dates.** Acts 1973, No. 248, § 3: Mar. 7, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the proper and efficient enforcement of the provisions of the Uniform Controlled Substances Act that the Prosecuting Attorneys and Grand Juries in the State be authorized to grant immunity from prosecution to persons giving testimony in criminal proceedings under that Act, and that this Act is designed to permit the granting of such immunity and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989 (3rd Ex. Sess.), No. 93, § 6: Nov. 17, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that additional enforcement mechanisms are urgently needed to deter persons under 18 years of age from illegally using or dealing in drugs; that this Act provides an additional enforcement mechanism; and that this Act should go into effect immediately in order to grant law enforcement officers and courts greater flexibility in dealing with the illegal use and sale of drugs. There-

fore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1257, § 11: Apr. 20, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that federal mandates require the loss of federal highway funds without implementation of a system of suspending the driving privileges of persons holding such privileges granted by this State and found guilty of certain drug offenses, whether such finding occurred in this state or out-of-state, and that additional enforcement provisions are urgently needed to deter persons illegally using or dealing in drugs; that this Act will provide that additional enforcement mechanism; and that this Act should go into effect immediately in order to meet the requirements of the federal law and to grant law enforcement officers and courts greater flexibility in dealing with the illegal use and sale of drugs. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

## 5-64-701. [Repealed.]

**Publisher's Notes.** This section, concerning penalties for delivery of controlled substances, was repealed by Acts 2005, No. 1994, § 549. The section was derived

from Acts 1975, No. 1005, §§ 1-3; 1983, No. 229, § 1; A.S.A. 1947, §§ 82-2641 — 82-2643.

**5-64-702. Promulgation of rules and regulations.**

(a) The Department of Health may promulgate rules and regulations necessary for the enforcement of this chapter.

(b) The rules and regulations described in subsection (a) of this section shall be promulgated pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

**History.** Acts 1979, No. 898, § 17; A.S.A. 1947, § 82-2632.1; Acts 2005, No. 1994, § 312.

**5-64-703. Authority to make inspections.**

In carrying out the functions under this chapter, the Director of the Department of Health or his or her duly authorized agent may enter a controlled premises and conduct an administrative inspection of the controlled premises.

**History.** Acts 1979, No. 898, § 18; A.S.A. 1947, § 82-2632.2; Acts 2005, No. 1994, § 312.

**5-64-704. Consent to inspection.**

An administrative inspection warrant is not required if informed consent is obtained from the owner, operator, or agent-in-charge of the controlled premises to be inspected.

**History.** Acts 1979, No. 898, § 19; A.S.A. 1947, § 82-2632.3.

**5-64-705. Authority to investigate and arrest in contiguous county.**

Upon receiving permission from the proper county sheriff, any law enforcement officer acting within the official scope of his or her duty may investigate and arrest any person violating any provision of this chapter in any county contiguous to the county where he or she is employed.

**History.** Acts 1985, No. 675, § 1; A.S.A. 1947, § 82-2625.2; Acts 2005, No. 1994, § 313.

**Publisher's Notes.** Acts 1985, No. 675, § 1, is also codified as § 12-12-102.

**Cross References.** Stopping and detention of person; time limitations, Ark. R. Crim. P. 3.1.

**RESEARCH REFERENCES**

U. Ark. Little Rock L.J. Survey, Criminal Procedure, 13 U. Ark. Little Rock L.J. 349.

## CASE NOTES

## ANALYSIS

Arrest Outside Jurisdiction.  
Territorial Jurisdiction.

**Arrest Outside Jurisdiction.**

There are only four instances where the General Assembly has delegated the authority for law enforcement officers to make an arrest outside of their jurisdictions: (1) "fresh pursuit" (§ 16-81-301); (2) when the police officer has a warrant for arrest (§ 16-81-105); (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction (§ 16-81-106(3) and (4)); and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of

drug laws (§ 5-64-705). *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

**Territorial Jurisdiction.**

The traditional concept of territorial jurisdiction for peace officers is a sound one since a local community is best served by the requirement that local officers familiar with local neighborhoods make arrests in the community. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

A local police officer, acting without a warrant outside the territorial limits of the jurisdiction under which he holds office, is without official power to apprehend an offender unless he is authorized to do so by statute, and evidence obtained as a result of an unlawful detention or illegal arrest is subject to the exclusionary rule and should be suppressed. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

**Cited:** *Davis v. Dahmm*, 763 F. Supp. 1010 (W.D. Ark. 1991).

**5-64-706. Grant of immunity.**

(a)(1) With the approval of the circuit judge, the prosecuting attorney of any judicial district in this state or any grand jury properly convened according to law may grant immunity from criminal prosecution with respect to a matter revealed by the testimony of anyone giving evidence concerning a violation of this chapter.

(2) However, the immunity does not extend to perjury committed in the testimony.

(b) No prosecuting attorney shall grant immunity until he or she has applied for and obtained in each case a written order from the circuit judge approving the grant of immunity.

(c) No immunity under subsection (a) of this section shall be granted by a prosecuting attorney until after the individual has declined to answer questions or has requested immunity before answering questions.

**History.** Acts 1973, No. 248, § 1; A.S.A. 1947, § 82-2639; Acts 2005, No. 1994, § 313.

## CASE NOTES

**Court Approval.**

The defendant in a prosecution for drug offenses was not entitled to immunity with regard to incriminating statements

he made during police interviews where there was never any agreement to grant immunity made by the prosecuting attorney and, even if there had been such an



agreement, there was no written court approval for it. *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998).

### **5-64-707. Admissibility of drug analysis — Cross-examination.**

(a) In any criminal prosecution for an alleged violation of this chapter, a record or report of any relevant drug analysis made by the State Crime Laboratory shall be received as competent evidence as to a matter contained in the record or report in this section in any preliminary hearing when attested to by the Executive Director of the State Crime Laboratory or his or her assistant or deputy.

(b)(1) Nothing in this section abrogates a defendant's right of cross-examination.

(2) If the defendant desires to cross-examine the executive director or the appropriate assistant or deputy, the defendant may compel the executive director or his or her appropriate assistant or deputy to attend court by the issuance of a proper subpoena.

(3) If the defendant compels the executive director or his or her appropriate assistant or deputy to attend court by the issuance of a proper subpoena:

(A) The record or report is only admissible through the executive director or the appropriate assistant or deputy; and

(B) The executive director or the appropriate assistant or deputy is subject to cross-examination by the defendant or his or her counsel.

**History.** Acts 1977, No. 356, § 1; A.S.A. 1947, § 82-2627.1; Acts 2005, No. 1994, § 313.

### **5-64-708. Local funding for undercover work.**

Any municipality or county may allocate and expend funds for:

(1) Undercover work done in connection with an attempt to apprehend a violator of this chapter; or

(2) A purchase of a controlled substance when purchased by a law enforcement officer for the purpose of apprehending a violator.

**History.** Acts 1973, No. 248, § 2; A.S.A. 1947, § 82-2640; Acts 2005, No. 1994, § 313.

### **5-64-709. [Repealed.]**

**Publisher's Notes.** This section, concerning additional court costs, was repealed by Acts 1995, No. 1256, § 20, as

amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4. The section was derived from Acts 1989, No. 631, § 1; 1991, No. 316, § 1.

**5-64-710. Denial of driving privileges for minor — Restricted permit.**

(a)(1) As used in this section “drug offense” means the:

(A) Possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell, or transfer any substance the possession of which is prohibited under this chapter; or

(B) Operation of a motor vehicle under the influence of any substance the possession of which is prohibited under this chapter.

(2) As used in subdivision (a)(1) of this section:

(A)(i) “Motor vehicle” means any vehicle that is self-propelled by which a person or thing may be transported upon a public highway and is registered in the State of Arkansas or of the type subject to registration in Arkansas.

(ii) “Motor vehicle” includes any:

(a) “Motorcycle”, “motor-driven cycle”, or “motorized bicycle”, as defined in § 27-20-101; and

(b) “Commercial motor vehicle”, as defined in § 27-23-103; and

(B) “Substance the possession of which is prohibited under this chapter” or “substance” means a “controlled substance” or “counterfeit substance”, as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802.

(b)(1)(A) When a person who is under eighteen (18) years of age pleads guilty or nolo contendere to or is found guilty of driving or boating while intoxicated under the Omnibus DWI or BWI Act, § 5-65-101 et seq., a criminal offense involving the illegal possession or use of a controlled substance, or any drug offense in this state or any other state, the court having jurisdiction of the matter, including any federal court, shall prepare and transmit to the Department of Finance and Administration an order of denial of driving privileges for the person under eighteen (18) years of age.

(B) A court within the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section to the department within twenty-four (24) hours after the plea or finding.

(C) A court outside Arkansas having jurisdiction over any person holding driving privileges issued by the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section pursuant to an agreement or arrangement entered into between that state and the Director of the Department of Finance and Administration.

(D) An arrangement or agreement under subdivision (b)(1)(C) of this section may also provide for the forwarding by the department of an order issued by a court within this state to the state where any person holds driving privileges issued by that state.

(2) For any person holding driving privileges issued by the State of Arkansas, a court within this state in a case of extreme and unusual hardship may provide in an order for the issuance of a restricted driving

permit to allow driving to and from a place of employment or driving to and from school.

(c)(1) Except as provided in subdivision (c)(2) of this section, a penalty prescribed in this section and § 27-16-914 is in addition to any other penalty prescribed by law for an offense covered by this section and § 27-16-914.

(2) A juvenile adjudicated delinquent is subject to a juvenile disposition provided in § 9-27-330.

(d) In regard to any offense involving illegal possession under this section, it is a defense if the controlled substance is the property of an adult who owns the motor vehicle.

(e) If a juvenile is found delinquent for any offense described in subsection (a) or subsection (b) of this section, the circuit court may order any juvenile disposition available under § 9-27-330.

**History.** Acts 1989 (3rd Ex. Sess.), No. 93, §§ 1, 3, 4; 1993, No. 1257, § 1; 2005, No. 1876, § 1; 2005, No. 1994, § 314; 2015, No. 299, § 5.

**A.C.R.C. Notes.** Acts 1993, No. 1257, § 7 provided: "The Director of the Department of Finance and Administration is authorized to enter into any agreements or arrangements with other states and to take all action deemed necessary or proper, including the making and promul-

gation of rules and regulations, in order that the amendments contained in this Act may be effectuated."

**Amendments.** The 2015 amendment, in (b)(1)(A), substituted "under eighteen" for "less than eighteen", inserted "or boating", inserted "the Omnibus DWI or BWI Act", substituted "a criminal offense" for "any criminal offense", and substituted "person under eighteen (18) years of age" for "minor".

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey, Criminal Law, 12 U. Ark. Little Rock L.J. 617.

## CASE NOTES

### Constitutionality.

The classification drawn at age eighteen in Acts 1989, No. 93 was reasonable and does not approach the level of irrationality or arbitrariness necessary to deem it un-

constitutional. *Carney v. State*, 305 Ark. 431, 808 S.W.2d 755 (1991).

**Cited:** *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992).

## SUBCHAPTER 8 — SALE OF DRUG DEVICES

### SECTION.

5-64-801. Definition.

5-64-802. Illegal drug paraphernalia business.

5-64-803. Public nuisance to be abated or closed.

### SECTION.

5-64-804. Injunction.

5-64-805. Search warrant.

5-64-806. Seizure and forfeiture.



RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Criminal Law, 4 U. Ark. Little Rock L.J. 583.

CASE NOTES

Constitutionality.

Acts 1981, No. 946 which enacted this subchapter prohibiting the operation of an illegal drug paraphernalia business, is not unconstitutionally overbroad, nor does it violate the due process rights of business owners on the claimed ground that discriminatory enforcement is a hypothetical possibility. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

Acts 1981, No. 946 which enacted this

subchapter, satisfies the fair notice due process requirements of what conduct is prohibited because in order to violate this section the offender must not only be distributing on a regular basis devices which are usable with illegal drugs, but the offender must also know or have reason to know that the objects are designed to be primarily useful as drug devices. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

5-64-801. Definition.

(a) As used in this subchapter, “drug device” means an object usable for smoking marijuana, for smoking a controlled substance defined as a tetrahydrocannabinol, or for ingesting or inhaling cocaine, and includes, but is not limited to:

- (1) A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;
- (2) A water pipe;
- (3) A carburetion tube or device;
- (4) A smoking or carburetion mask;
- (5) A roach clip, meaning an object used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
- (6) A chamber pipe;
- (7) A carburetor pipe;
- (8) An electric pipe;
- (9) An air-driven pipe;
- (10) A chillum;
- (11) A bong;
- (12) An ice pipe or chiller; and
- (13) A miniature cocaine spoon or a cocaine vial.

(b) In any prosecution under this subchapter, the question of whether an object is a drug device is a question of fact.

**History.** Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644.

**5-64-802. Illegal drug paraphernalia business.**

(a) Any person who conducts, finances, manages, supervises, directs, or owns any part of an illegal drug paraphernalia business is guilty of a:

- (1) Class A misdemeanor for the first offense;
- (2) Class D felony for the second offense; and
- (3) Class C felony for third and subsequent offenses.

(b) A person violates subsection (a) of this section if he or she:

(1) Conducts, finances, manages, supervises, directs, or owns any part of a business that, in the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives away, or furnishes an object designed to be primarily useful as a drug device; and

(2) Knows or has reason to know that the design of the object renders it primarily useful as a drug device.

**History.** Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644.

**CASE NOTES****Arrest Warrant Improper.**

Defendant's arrest was illegal because, although there was reasonable cause to believe that defendant committed the offense of owning an illegal drug paraphernalia business, that was a misdemeanor offense, for which a summons, and not an arrest warrant, should have issued under Ark. R. Crim. P. 7.1(b)(i). There was no information tending to show that defendant would not respond to a summons, the offense of owning a store that sold drug

paraphernalia was, in itself, not a violent offense and did not involve the risk of imminent serious bodily injury, and the good-faith exception did not apply because there was no good-faith reliance that an arrest warrant, as opposed to a summons, could be issued for the misdemeanor; therefore, the incriminating evidence obtained as a result of the illegal arrest was the fruit of the poisonous tree. *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007).

**5-64-803. Public nuisance to be abated or closed.**

(a) A place where a drug device is manufactured, sold, stored, possessed, given away, or furnished in violation of this subchapter is deemed a common or public nuisance.

(b) A conveyance or vehicle of any kind is deemed a "place" within the meaning of subsection (a) of this section and may be proceeded against under the provisions of § 5-64-804.

(c) A person who maintains, or aids or abets, or knowingly associates with another in maintaining a common or public nuisance under subsection (a) of this section is in violation of this subchapter, and judgment shall be given that the common or public nuisance be abated or closed as a place for the manufacture, sale, storage, possession, giving away, or furnishing of a drug device.

**History.** Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644; Acts 2007, No. 827, § 67.

**5-64-804. Injunction.**

(a) The prosecuting attorney or a citizen of the county or municipality where a common or public nuisance, as defined in § 5-64-803, is located may maintain a suit in the name of the state to abate and perpetually enjoin the common or public nuisance.

(b) A circuit court has jurisdiction over the suit.

(c) An injunction may be granted at the commencement of the suit and no bond is required if the action for injunction is brought by the prosecuting attorney.

(d) If the suit for injunction is brought or maintained by a citizen of the county or municipality where the common or public nuisance is alleged to be located, then the circuit court may require a bond as in any other case of injunction.

(e) On the finding that the material allegations of the complaint are true, the circuit court or judge of the circuit court in vacation shall order the injunction for such period of time as the circuit court or judge may think proper, with the right to dissolve the injunction upon the application of the owner of the place if a proper case is shown for the dissolution.

(f) The continuance of the injunction as provided in this section may be ordered, although the place complained of may not at the time of hearing be unlawfully used.

**History.** Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644.

**5-64-805. Search warrant.**

(a) If there is complaint on oath or affirmation supported by affidavit setting forth the facts for a belief that a drug device is being manufactured, sold, kept, stored, or in any manner held, used, or concealed in a particular house or other place with intent to engage in illegal drug paraphernalia business in violation of law, a circuit court or the judge of the circuit court in vacation to whom the complaint is made, if satisfied that there is probable cause for the belief, shall issue a warrant to search the house or other place for the drug device.

(b) Except as otherwise provided in this section, a warrant issued under subsection (a) of this section shall be issued, directed, and executed in accordance with the laws of Arkansas pertaining to search warrants.

(c) A warrant issued under this section for the search of any automobile, boat, conveyance, or vehicle, or for the search of any trunk, grip, or other article of baggage, for a drug device may be executed in any part of the state where the same are overtaken and shall be made returnable before any circuit court or the judge of the circuit court in vacation, within whose jurisdiction the automobile, boat, conveyance, vehicle, trunk, grip, or other article of baggage, or any of them, were transported or attempted to be transported.



(d) If it is necessary, an officer charged with the execution of a warrant issued under this section may break open and enter a house or other place described in this section.

**History.** Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644.

### 5-64-806. Seizure and forfeiture.

Any property, including money, used in violation of a provision of this subchapter may be seized and forfeited to the state.

**History.** Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644.

**Cross References.** Donation of seized equipment to public schools, § 6-21-102.

## SUBCHAPTER 9 — CIVIL ACTIONS AGAINST SELLERS OF DRUG PARAPHERNALIA

### SECTION.

5-64-901 — 5-64-906. [Transferred.]

### 5-64-901 — 5-64-906. [Transferred.]

**Publisher's Notes.** The provisions of this subchapter have been transferred to chapter 118 of title 16.

## SUBCHAPTER 10 — RECORDS OF TRANSACTIONS

### SECTION.

5-64-1001. Recordkeeping required.

5-64-1002. Identification of purchaser.

5-64-1003. Inspection of records.

5-64-1004. Failure to maintain records —  
Penalty.

### SECTION.

5-64-1005. Exemptions.

5-64-1006. Suspicious transaction reports.

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**Effective Dates.** Acts 2001, No. 1209, §§ 6, 7: June 1, 2001. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the methamphetamine problem has become epidemic in the State of Arkansas; that drastic measures are needed to control the sale and possession of large quantities of over-the-counter medicines which contain the necessary ingredients for making methamphetamine; that the public's inconvenience is far outweighed by the necessity of curtailing the illegal production and distribution of methamphetamine; that giving this act immediate effect may spare thousands of Arkansans from the devastation caused

from methamphetamine addiction. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2005, No. 256, § 7: Mar. 24, 2005. Emergency clause provided: "It is hereby found and determined by the Eighty-fifth

General Assembly that the effectiveness of this act is essential to the safety of the citizens of Arkansas; that excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine causes harm to citizens of Arkansas; and that a delay in the effective date of this act beyond thirty days needed to implement it would unnecessarily expose the citizens of Arkansas to the risk of irreparable harm. Therefore, an emergency is declared to exist and this act being immediately necessary for the pres-

ervation of the public peace, health, and safety shall be effective on: (1) Thirty (30) days from and after the date of its passage and approval; (2) If the bill is neither approved nor vetoed by the Governor, it shall become effective thirty (30) days from the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, it shall become effective thirty (30) days from the date the last house overrides the veto."

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### **5-64-1001. Recordkeeping required.**

Any manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes any of the following substances to any person in this state shall maintain accurate records of those transactions:

- (1) Phenylpropanolamine;
- (2) Methylamine;
- (3) Ethylamine;
- (4) D-lysergic acid;
- (5) Ergotamine tartrate;
- (6) Diethyl malonate;
- (7) Malonic acid;
- (8) Ethyl malonate;
- (9) Barbituric acid;
- (10) Piperidine;
- (11) N-acetylanthranilic acid;
- (12) Pyrrolidine;
- (13) Anthranilic acid;
- (14) Ephedrine;
- (15) Norpseudoephedrine;
- (16) Phenylacetic acid;
- (17) Morpholine; and
- (18) Pseudoephedrine.

**History.** Acts 1989, No. 518, § 1.

### **5-64-1002. Identification of purchaser.**

(a) Any manufacturer, wholesaler, retailer, or other person required to maintain records of transactions under this subchapter shall obtain proper identification from the purchaser.

(b) "Proper identification" means a motor vehicle operator's license or other official state-issued identification of the purchaser that contains a photograph of the purchaser, and includes:

(1) The residential or mailing address of the purchaser, other than a post office box number;

(2) The motor vehicle license number of any motor vehicle owned or operated by the purchaser; and

(3) A letter of authorization from the business for which any substance specified in § 5-64-1001 is being furnished, that includes:

(A) The business license number and address of the business;

(B) A full description of how the substance is to be used; and

(C) The signature of the purchaser.

(c) The person selling, transferring, or otherwise furnishing any substance specified in § 5-64-1001 shall affix his or her signature as a witness to the signature and identification of the purchaser.

**History.** Acts 1989, No. 518, § 1.

### **5-64-1003. Inspection of records.**

A record maintained pursuant to this subchapter is subject to inspection by any law enforcement officer of this state or any employee of the Department of Health designated by the Director of the Department of Health to conduct an examination, investigation, or inspection under this chapter relating to a controlled substance, counterfeit drug, or precursor chemical.

**History.** Acts 1989, No. 518, § 1.

### **5-64-1004. Failure to maintain records — Penalty.**

Failure to maintain accurate records with proper identification from the purchaser is considered a Class A misdemeanor.

**History.** Acts 1989, No. 518, § 1.

### **5-64-1005. Exemptions.**

The provisions of § 5-64-1001 do not apply to any of the following:

(1) Any pharmacist or other authorized person who sells or furnishes a substance upon the prescription of a physician, dentist, podiatrist, or veterinarian;

(2) Any physician, dentist, podiatrist, or veterinarian who administers or furnishes a substance to his or her patient;

(3) Any manufacturer or wholesaler licensed by the Arkansas State Board of Pharmacy that sells, transfers, or otherwise furnishes a substance to a licensed pharmacy, physician, dentist, podiatrist, or veterinarian; or

(4) Any sale, transfer, furnishing, or receipt by a retail distributor of any drug that contains any ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine and that is sold, transferred, or furnished over the counter without a prescription pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., or



regulations adopted under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., if:

(A) The drug is sold in a blister pack of not more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine base, each blister containing not more than two (2) dosage units;

(B) The use of a blister pack is technically unfeasible, the drug is packaged in a unit dose packet or pouch;

(C) The drug is an exempted product described in § 5-64-1103(b)(1), or the product contains ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form described in § 5-64-1103(b)(2), and is sold in a package size of not more than three grams (3g) of ephedrine or pseudoephedrine base; and

(D) The total quantity of the sale is not greater than three (3) packages or five grams (5g) of ephedrine or nine grams (9g) of pseudoephedrine, whichever is smaller.

**History.** Acts 1989, No. 518, § 1; 2001, No. 1209, § 1; 2005, No. 256, § 3.

**A.C.R.C. Notes.** Acts 2005, No. 256, § 1, provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practi-

cable from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## 5-64-1006. Suspicious transaction reports.

(a) Any pharmacy, manufacturer, wholesaler, or retail distributor that is required to keep records under this subchapter and that sells, transfers, or otherwise furnishes ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers, alone or in a mixture, to any person in this state in a suspicious transaction shall report the transaction in writing to the Arkansas State Board of Pharmacy.

(b) Any person who does not submit a report as required by subsection (a) of this section is guilty of a Class A misdemeanor.

(c) As used in this section, "suspicious transaction" means a sale or transfer to which either of the following applies:

(1) The circumstances of the sale or transfer would lead a reasonable person to believe that the substance is likely to be used for the purpose

of unlawfully manufacturing a controlled substance in violation of this chapter based on such factors as:

- (A) The amount involved;
- (B) The method of payment;
- (C) The method of delivery; and

(D) Past dealings with the person acquiring the substance; or

(2) The transaction involves payment for ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers, alone or in a mixture, in cash or money orders totaling more than two hundred dollars (\$200).

(d)(1) The board shall adopt by rule criteria for determining whether a transaction is a suspicious transaction, taking into consideration the recommendations in Appendix A, Report to the United States Attorney General by the Suspicious Orders Task Force, under the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237.

(2) In addition to any other penalty provided for in this section, the board may impose a civil penalty for a violation of subsection (a) of this section not to exceed ten thousand dollars (\$10,000) per violation.

**History.** Acts 2001, No. 1209, § 2; 2005, No. 256, § 4.

**A.C.R.C. Notes.** Acts 2005, No. 256, § 1, provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practi-

cable from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Application.

### Constitutionality.

This section was not impermissibly vague as applied and did not violate the due process guarantee at Ark. Const., Art. II, § 8, because the statute and its supporting regulations were specific enough to provide fair notice that one was re-

quired to report to the Arkansas State Board of Pharmacy when one's customers were likely to be using List 1 chemicals to illegally manufacture a controlled substance. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharm.*, 2010 Ark. 40, 358 S.W.3d 890 (2010).

In determining that this section was not impermissibly vague as applied, a vagueness challenge to 21 U.S.C. § 830(b)(1)(A), under the similar federal scheme, was instructive in pointing out

that a scienter requirement generally saved a statute from unconstitutional vagueness. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharm.*, 2010 Ark. 40, 358 S.W.3d 890 (2010).

**Application.**

Administrative decision that a distributor violated this section was supported by substantial evidence because, in addition

to the nearly 300 transactions with some twenty customers that appellee Arkansas State Board of Pharmacy identified as involving predominantly listed chemicals, testimony regarding purchases of pseudoephedrine from the distributor was presented at the hearing to support the board’s order. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharm.*, 2010 Ark. 40, 358 S.W.3d 890 (2010).

**SUBCHAPTER 11 — EPHEDRINE AND OTHER NONPRESCRIPTION DRUGS**

SECTION.

- 5-64-1101. Possession — Penalty.
- 5-64-1102. Possession with purpose to manufacture — Unlawful distribution.
- 5-64-1103. Sales limits.
- 5-64-1104. Sales records — Entering transactions into real-time electronic logbook — Purchaser’s proof of identity.
- 5-64-1105. Definitions.
- 5-64-1106. Real-time electronic logbook.

SECTION.

- 5-64-1107. Confidentiality of information.
- 5-64-1108. Authorized access to the real-time electronic logbook.
- 5-64-1109. Promulgation of rules.
- 5-64-1110. Destruction of records.
- 5-64-1111. Liability of pharmacy or pharmacist.
- 5-64-1112. Penalty for unauthorized disclosure and unauthorized access.
- 5-64-1113. Pharmacist-authorized drugs.

**A.C.R.C. Notes.** Acts 2007, No. 508, § 1, provided: “The General Assembly finds that:

“(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

“(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of methamphetamine;

“(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

“(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine.”

**Effective Dates.** Acts 2001, No. 1209, § 6: June 1, 2001.

Acts 2001, No. 1209, § 7: Mar. 30, 2001. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the methamphetamine problem has become epidemic in the State of Arkansas; that drastic measures are needed to control the sale and possession of large quantities of over-the-counter medicines which contain the necessary ingredients for making methamphetamine; that the public’s inconvenience is far outweighed by the necessity of curtailing the illegal production and distribution of methamphetamine; that giving this act immediate effect may spare thousands of Arkansans from the devastation caused from methamphetamine addiction. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective



tive on the date the last house overrides the veto.”

Acts 2005, No. 256, § 7: Mar. 24, 2005. Emergency clause provided: “It is hereby found and determined by the Eighty-fifth General Assembly that the effectiveness of this act is essential to the safety of the citizens of Arkansas; that excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine causes harm to citizens of Arkansas; and that a delay in the effective date of this act beyond thirty days needed to implement it would unnecessarily expose the citizens of Arkansas to the risk of irreparable harm. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall be effective on: (1) Thirty (30) days from and after the date of its passage and approval; (2) If the bill is neither approved nor vetoed by the Governor, it shall become effective thirty (30) days from the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, it shall become effective thirty (30) days

from the date the last house overrides the veto.”

Acts 2013, No. 176, § 2: Mar. 1, 2013. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that military identification cards cannot be entered into the current state tracking system; that because many military personnel in Arkansas are not citizens of the state and do not have a state identification card or driver’s license, many military personnel are prohibited from purchasing pseudoephedrine; and that this act is immediately necessary because many military personnel are currently prevented from receiving needed medical treatment. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

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### **5-64-1101. Possession — Penalty.**

(a) It is unlawful for any person to possess more than five grams (5g) of ephedrine or nine grams (9g) of pseudoephedrine or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers, alone or in a mixture, except:

(1) Any pharmacist or other authorized person who sells or furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers, upon the prescription of a physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority, or as authorized pursuant to § 5-64-1103;

(2) A product exempted under § 5-64-1103(b)(1) and (2), without a prescription, pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., or regulations adopted under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., if the person possesses a sales and use tax permit issued by the Department of Finance and Administration;

(3) Any physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority who administers or furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their

salts, optical isomers, and salts of optical isomers to his or her patient; or

(4)(A) Any manufacturer, wholesaler, or distributor licensed by the Arkansas State Board of Pharmacy that meets one (1) of the requirements in subdivision (a)(4)(B) of this section and sells, transfers, or otherwise furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers to:

(i) A licensed pharmacy, physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority; or

(ii) Any person who possesses a sales and use tax permit issued by the department.

(B)(i) The manufacturer, wholesaler, or distributor shall hold or store the substance in a facility that meets the packaging requirements of § 5-64-1005(4)(A)-(C).

(ii) The manufacturer, wholesaler, or distributor shall sell, transfer, or otherwise furnish only to a healthcare professional identified in subdivisions (a)(1) and (a)(3) of this section.

(b) Possession of more than five grams (5g) of ephedrine or more than nine grams (9g) of pseudoephedrine or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers constitutes prima facie evidence of the intent to manufacture methamphetamine or another controlled substance in violation of this subchapter unless the person qualifies for an exemption listed in subsection (a) of this section.

(c) Any person who violates a provision of this section is guilty of a Class D felony.

**History.** Acts 1997, No. 565, § 1; 2001, No. 1209, § 3; No. 1782, § 1; 2003, No. 867, § 2; 2005, No. 256, § 5.

**A.C.R.C. Notes.** Acts 2003, No. 867, § 1 provided: "The purpose of this act is to revise Arkansas law regarding the penalties for possession of illegal drugs."

Acts 2005, No. 256, § 1 provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practicable from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Controlled Substances, 26 U. Ark. Little Rock L. Rev. 366.

Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

### ANALYSIS

Construction With Other Law.  
Evidence Held Sufficient.

#### Construction With Other Law.

Arkansas counties' claims under §§ 5-64-1102 and 16-118-107, failed as a matter of law because their allegations did not show that companies that produced and marketed cold remedies containing ephedrine and pseudoephedrine, which ingredients were used in manufacturing methamphetamine (meth), unlawfully sold, distributed, or dispensed the remedies with reckless disregard as to how they would be used: (1) the counties did not allege that the companies failed to comply with federal law or this section or § 5-64-1103, which regulated the possession and sale of products containing ephedrine or pseudoephedrine; (2) it appeared that this section, rather than § 5-64-1102, applied to the companies because there was nothing in the record showing that the companies distributed their remedies to unlicensed or unregistered entities or that their commercial buyers, which included retailers, intended to use the remedies to manufacture meth; and (3) even if § 5-64-1102 applied, the counties did not offer any example of the companies' alleged reckless behavior beyond their broad assertion that distributing the remedies in

their current pharmaceutical formulation was reckless. *Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882 (E.D. Ark. 2008), *aff'd*, *Ashley County v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009).

#### Evidence Held Sufficient.

Defendant store manager's possession of five cases of pseudoephedrine pills, outside of the store licensed to sell them, was sufficient to sustain her conviction for possession of more than five grams of ephedrine. *Ford v. State*, 75 Ark. App. 126, 55 S.W.3d 315 (2001).

Where the total amount of pseudoephedrine found at defendant's residence was 7.5 grams, when considered with other evidence, there was sufficient evidence from which the jury could conclude that defendant possessed ephedrine with intent to manufacture. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003).

In a case involving over-possession of pseudoephedrine under this section, there was sufficient evidence to support a conviction where defendant exercised care and control over the items in question, despite the fact that a van was not his, and the drugs were found under the passenger's seat; evidence showed that defendant was acting suspiciously, and he was the only occupant in the van. *Lytle v. State*, 91 Ark. App. 243, 209 S.W.3d 421 (2005).

### 5-64-1102. Possession with purpose to manufacture — Unlawful distribution.

(a)(1) It is unlawful for a person to possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, or salts of optical isomers with a purpose to manufacture methamphetamine.

(2) A person who violates subdivision (a)(1) of this section upon conviction is guilty of a:

(A) Class D felony if the quantity of substances listed in subdivision (a)(1) of this section is capable of producing ten grams (10g) or less of methamphetamine; or

(B) Class B felony if the quantity of substances listed in subdivision (a)(1) of this section is capable of producing more than ten grams (10g) of methamphetamine.



(b)(1) It is unlawful for a person to possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, or salts of optical isomers in a quantity capable of producing twenty-eight grams (28g) or more of a Schedule I or Schedule II controlled substance that is a narcotic drug or methamphetamine with a purpose to manufacture methamphetamine.

(2) A person who violates subdivision (b)(1) of this section upon conviction is guilty of a Class B felony.

(c)(1) It is unlawful for a person to sell, transfer, distribute, or dispense any product containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers if the person:

(A) Knows that the purchaser will use the product as a precursor to manufacture methamphetamine or another controlled substance; or

(B) Sells, transfers, distributes, or dispenses the product with reckless disregard as to how the product will be used.

(2) A person who violates subdivision (c)(1) of this section upon conviction is guilty of a Class D felony.

**History.** Acts 1997, No. 565, § 2; 2001, No. 1209, § 4; 2011, No. 570, § 69.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Amendments.** The 2011 amendment

substituted “purpose” for “intent” in the section heading and (a)(1); subdivided (a)(2); inserted “upon conviction” in the introductory language of (a)(2) and in (c)(2); inserted “if the quantity ... methamphetamine; or” in (a)(2)(A); added (a)(2)(B); inserted (b) and redesignated former (b) as (c); and substituted “(c)(1)” for “(b)(1)” in (c)(2).

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

CASE NOTES

ANALYSIS

Elements of Offense.  
Evidence Sufficient.  
Private Actions.

Elements of Offense.

Trial court did not err in failing to give a lesser-included offense instruction because possession of pseudoephedrine with intent to manufacture methamphetamine under subdivision (a)(1) of this section was not a lesser-included offense of possession of drug paraphernalia with intent to manufacture methamphetamine under former § 5-64-403(c)(5) (see now § 5-64-443); the plain language of the two stat-

utes indicates that they contain different elements. *Autrey v. State*, 90 Ark. App. 131, 204 S.W.3d 84 (2005).

Evidence Sufficient.

Fact finder did not have to resort to speculation or conjecture to find that defendant possessed pseudoephedrine with the intent to manufacture methamphetamine. *Champlin v. State*, 98 Ark. App. 305, 254 S.W.3d 780 (2007).

Private Actions.

Arkansas counties’ claims under this section and § 16-118-107, failed as a matter of law because their allegations did not show that companies that produced and

marketed cold remedies containing ephedrine and pseudoephedrine, which ingredients were used in manufacturing methamphetamine (meth), unlawfully sold, distributed, or dispensed the remedies with reckless disregard as to how they would be used: (1) the counties did not allege that the companies failed to comply with federal law or § 5-64-1101 or § 5-64-1103, which regulated the possession and sale of products containing ephedrine or pseudoephedrine; (2) it appeared that § 5-64-1101, rather than this section, applied to the companies because there was nothing in the record showing that the compa-

nies distributed their remedies to unlicensed or unregistered entities or that their commercial buyers, which included retailers, intended to use the remedies to manufacture meth; and (3) even if this section applied, the counties did not offer any example of the companies' alleged reckless behavior beyond their broad assertion that distributing the remedies in their current pharmaceutical formulation was reckless. *Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882 (E.D. Ark. 2008), *aff'd*, *Ashley County v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009).

### **5-64-1103. Sales limits.**

(a) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a)(3) and (4), to knowingly sell, transfer, or otherwise furnish in a single transaction a product containing ephedrine, pseudoephedrine, or phenylpropanolamine except in a licensed pharmacy by a licensed pharmacist or a registered pharmacy technician.

(b) Unless the product has been rescheduled pursuant to § 5-64-212(c), this section does not apply to a retail distributor sale for personal use of a product:

(1) That the Department of Health, in collaboration with the Arkansas State Board of Pharmacy, upon application of a manufacturer, exempts by rule from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine or its salts or precursors; or

(2) Containing ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form if the drug is dispensed, sold, transferred, or otherwise furnished in a single transaction limited to no more than three (3) packages, with any single package containing not more than ninety-six (96) liquid capsules or liquid gel capsules or not more than three grams (3g) of ephedrine or pseudoephedrine base.

(c)(1)(A) Except under a valid prescription, before dispensing a product containing ephedrine, pseudoephedrine, or phenylpropanolamine that is not exempt under subdivision (b)(1) or subdivision (b)(2) of this section, a pharmacist shall make a professional determination as to whether or not there is a legitimate medical and pharmaceutical need for the product containing ephedrine, pseudoephedrine, or phenylpropanolamine.

(B) The determination under subdivision (c)(1)(A) of this section may be based on factors, including without limitation:

- (i) Prior medication-filling history;
- (ii) Patient screening; and
- (iii) Other tools that provide professional reassurance to the pharmacist that a legitimate medical and pharmaceutical need exists.

(2) The board may:

(A) Adopt rules regarding determinations made under subdivision (c)(1) of this section;

(B) Review determinations made under subdivision (c)(1) of this section; and

(C) Take appropriate disciplinary action as required.

(3) This subsection does not prohibit a pharmacist from dispensing a product containing ephedrine, pseudoephedrine, or phenylpropanolamine to a person who:

(A) Has not utilized the services of the pharmacist frequently; or

(B) Has not established a pharmacist-patient relationship with the pharmacist before the instance of dispensing.

(d) Except under a valid prescription, it is unlawful for a licensed pharmacist to dispense or a registered pharmacy technician to knowingly sell, transfer, or otherwise furnish in a single transaction:

(1) More than three (3) packages of one (1) or more products that contain ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers;

(2) Any single package of any product that contains ephedrine, pseudoephedrine, or phenylpropanolamine, that contains more than ninety-six (96) pills, tablets, gelcaps, capsules, or other individual units or more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, or a combination of any of these substances, whichever is smaller;

(3) Any product containing ephedrine, pseudoephedrine, or phenylpropanolamine, unless:

(A) The product is sold in a package size of not more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine base and is packaged in a blister pack, each blister containing not more than two (2) dosage units;

(B) When the use of a blister pack is technically infeasible, that is packaged in a unit dose packet or pouch; or

(C) In the case of a liquid, the drug is sold in a package size of not more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine base; or

(4)(A) Any product containing ephedrine, pseudoephedrine, or phenylpropanolamine to any person under eighteen (18) years of age, unless the person is purchasing an exempt product under subdivision (b)(1) or subdivision (b)(2) of this section.

(B) The person making the sale shall require proof of age from the purchaser.

(e)(1)(A) A person who violates subsection (a) or subsection (d) of this section for a first or second offense upon conviction is guilty of a Class A misdemeanor and also may be subject to a civil fine not to exceed five thousand dollars (\$5,000).

(B) A person who violates subsection (a) or subsection (d) of this section for a third offense upon conviction is guilty of a Class D felony and also may be subject to a civil fine not to exceed five thousand dollars (\$5,000).



(C) A person who violates subsection (a) or subsection (d) of this section for a fourth or subsequent offense upon conviction is guilty of a Class C felony and also may be subject to a civil fine not to exceed ten thousand dollars (\$10,000).

(2) A plea of guilty or nolo contendere to or a finding of guilt under a penal law of the United States or another state that is equivalent to subsection (a) or subsection (d) of this section is considered a previous offense for purposes of this subsection.

(3)(A) The prosecuting attorney may waive any civil penalty under this section if a person establishes that he or she acted in good faith to prevent a violation of this section, and the violation occurred despite the exercise of due diligence.

(B) In making this determination, the prosecuting attorney may consider evidence that an employer trained employees how to sell, transfer, or otherwise furnish substances specified in this subchapter in accordance with applicable laws.

(f)(1)(A) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a), to knowingly purchase, acquire, or otherwise receive in a single transaction:

(i) More than three (3) packages of one (1) or more products that the person knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers; or

(ii) Any single package of any product that the person knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, that contains more than ninety-six (96) pills, tablets, gelcaps, capsules, or other individual units or more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, or a combination of any of these substances, whichever is smaller.

(B) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a), to knowingly purchase, acquire, or otherwise receive more than five grams (5g) of ephedrine or nine grams (9g) of pseudoephedrine or phenylpropanolamine within any thirty-day period.

(2)(A) A person who violates subdivision (f)(1)(A) or subdivision (f)(1)(B) of this section for a first or second offense upon conviction is guilty of a Class A misdemeanor.

(B) A person who violates subdivision (f)(1)(A) or subdivision (f)(1)(B) of this section for a third offense upon conviction is guilty of a Class D felony.

(C) A person who violates subdivision (f)(1)(A) or subdivision (f)(1)(B) of this section for a fourth or subsequent offense upon conviction is guilty of a Class C felony.

(3) A plea of guilty or nolo contendere to or a finding of guilt under a penal law of the United States or another state that is equivalent to subdivision (f)(1)(A) or subdivision (f)(1)(B) of this section is considered a previous offense for the purposes of this subsection.

(g) This section does not prohibit a person under eighteen (18) years of age from possessing and selling a product described in subsections (a)

and (b) of this section as an agent of the minor's employer acting within the scope of the minor's employment.

**History.** Acts 2001, No. 1209, § 5; 2003, No. 277, §§ 1, 2; 2005, No. 256, § 6; 2007, No. 508, § 2; 2007, No. 827, §§ 68, 70; 2009, No. 712, §§ 1, 2; 2011, No. 588, §§ 2, 3; 2013, No. 1125, § 15; 2015, No. 940, §§ 1, 2.

**A.C.R.C. Notes.** Acts 2005, No. 256, § 1, provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practicable from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropa-

nolamine utilized to manufacture methamphetamine."

The amendments to this section by Acts 2007, No. 508, § 2 are codified in § 5-64-1104.

**Amendments.** The 2011 amendment deleted "dispense" following "knowingly" in (a); inserted (c) and redesignated the remaining subsections accordingly; and deleted "unless from the purchaser's outward appearance the person would reasonably presume the purchaser to be twenty-five (25) years of age or older" at the end of (d)(4)(B).

The 2013 amendment substituted "product containing ephedrine, pseudoephedrine, or phenylpropanolamine" for "drug" at the end of (c)(1)(A).

The 2015 amendment deleted "based on a pharmacist patient relationship" after "a pharmacist shall make a professional determination" in (c)(1)(A); added (c)(3); deleted "(g) [Repealed.]" and redesignated former (h) as (g); and substituted "This section does not prohibit" for "Nothing in this section prohibits" in (g).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

## CASE NOTES

**Cited:** Independence County v. Pfizer, Inc., 534 F. Supp. 2d 882 (E.D. Ark. 2008).

### 5-64-1104. Sales records — Entering transactions into real-time electronic logbook — Purchaser's proof of identity.

(a) A pharmacy shall:

(1) Maintain a written or electronic log or receipts of transactions involving the sale of ephedrine, pseudoephedrine, or phenylpropanolamine; and

(2) Enter any transaction required to be maintained by this section into the real-time electronic logbook maintained by the Arkansas Crime Information Center under § 5-64-1106.

(b) A person purchasing, receiving, or otherwise acquiring ephedrine, pseudoephedrine, or phenylpropanolamine shall:

(1) Produce current and valid proof of identity; and

(2) Sign a written log or an electronic log or a receipt that documents the date of the transaction, the name of the person, and the quantity of ephedrine, pseudoephedrine, or phenylpropanolamine purchased, received, or otherwise acquired.

(c) The requirements of subsection (a) of this section and subdivision (b)(2) of this section are satisfied by entering the information required to be produced into the real-time electronic logbook maintained by the Arkansas Crime Information Center under § 5-64-1106.

**History.** Acts 2007, No. 508, § 2; 2007, No. 827, § 69.

### **5-64-1105. Definitions.**

As used in this subchapter:

(1) “Ephedrine”, “pseudoephedrine”, and “phenylpropanolamine” means any product containing ephedrine, pseudoephedrine, or phenylpropanolamine or any of their salts, isomers, or salts of isomers, alone or in a mixture;

(2) “Proof of age” and “proof of identity” mean:

(A) A driver’s license or identification card issued by the Department of Finance and Administration that contains a photograph of the person, the person’s date of birth, and a functioning magnetic stripe or bar code; or

(B) An identification card issued by the United States Department of Defense to active duty military personnel that contains a photograph of the person and the person’s date of birth;

(3)(A) “Retail distributor” means a grocery store, general merchandise store, drugstore, convenience store, or other related entity, the activities of which, as a distributor of ephedrine, pseudoephedrine, or phenylpropanolamine products, are limited exclusively to the sale for personal use of ephedrine, pseudoephedrine, or phenylpropanolamine products, both in number of sales and volume of sales, either directly to walk-in customers or in face-to-face transactions by direct sales.

(B) “Retail distributor” includes any person or entity that makes a direct sale or has knowledge of the direct sale.

(C) “Retail distributor” does not include:

(i) Any manager, supervisor, or owner not present and not otherwise aware of the direct sale; or

(ii) The parent company of a grocery store, general merchandise store, drugstore, convenience store, or other related entity if the parent company is not involved in direct sales regulated by this subchapter; and

(4) “Sale for personal use” means the sale in a single transaction to an individual customer for a legitimate medical use of a product containing ephedrine, pseudoephedrine, or phenylpropanolamine in a quantity at or below that specified in § 5-64-1103, and includes the sale of those products to an employer to be dispensed to employees from a first-aid kit or medicine chest.



**History.** Acts 2007, No. 827, § 71; 2011, No. 588, § 4; 2013, No. 176, § 1.

**Amendments.** The 2011 amendment rewrote (2).

The 2013 amendment, in (2), inserted the (A) designator, deleted “or an identi-

cation card issued by the United States Department of Defense to active duty military personnel” following “Department of Finance and Administration”, and added (B).

**5-64-1106. Real-time electronic logbook.**

(a)(1) Subject to available funding, on or before May 15, 2008, the Arkansas Crime Information Center shall provide pharmacies in this state access to a real-time electronic logbook for the purpose of entering into the real-time electronic logbook any transaction required to be reported by § 5-64-1104.

(2) The real-time electronic logbook shall have the capability to calculate both state and federal ephedrine, pseudoephedrine, or phenylpropanolamine purchase limitations.

(b) The center may contract with a private vendor to implement this section.

(c) The center shall not charge a pharmacy any fee:

(1) To support the establishment or maintenance of the real-time electronic logbook; or

(2) For any computer software required to be installed as part of the real-time electronic logbook.

**History.** Acts 2007, No. 508, § 3.

**5-64-1107. Confidentiality of information.**

(a) Information entered into the real-time electronic logbook is confidential and is not subject to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b) Except as authorized under § 5-64-1108 or otherwise by law, the Arkansas Crime Information Center shall not disclose any information entered, collected, recorded, transmitted, or maintained in the real-time electronic logbook.

**History.** Acts 2007, No. 508, § 3.

**5-64-1108. Authorized access to the real-time electronic logbook.**

The Arkansas Crime Information Center shall provide access to the real-time electronic logbook to the following:

(1) Any person authorized to prescribe or dispense products containing ephedrine, pseudoephedrine, or phenylpropanolamine for the purpose of providing medical care or pharmaceutical care;

(2) A local, state, or federal law enforcement official or a local, state, or federal prosecutor;

(3) A local, state, or federal official who requests access for the purpose of facilitating a product recall necessary for the protection of the public health and safety; and

(4) The Arkansas State Board of Pharmacy for the purpose of investigating a suspicious transaction, as allowed under § 5-64-1006.

**History.** Acts 2007, No. 508, § 3.

#### **5-64-1109. Promulgation of rules.**

The Arkansas Crime Information Center, after consulting with the Arkansas State Board of Pharmacy, shall promulgate rules necessary to:

(1) Implement the provisions of §§ 5-64-1104(a)(2) and 5-64-1106 — 5-64-1112;

(2) Ensure that the real-time electronic logbook enables a pharmacy to monitor the sales of ephedrine, pseudoephedrine, or phenylpropanolamine occurring at that pharmacy;

(3) Allow a pharmacy to determine whether it will access information concerning sales of ephedrine, pseudoephedrine, or phenylpropanolamine made at other pharmacies in this state; and

(4) Ensure that the real-time electronic logbook does not allow access to a competitor's pricing information for ephedrine, pseudoephedrine, and phenylpropanolamine.

**History.** Acts 2007, No. 508, § 3.

#### **5-64-1110. Destruction of records.**

The Arkansas Crime Information Center shall destroy any transaction record maintained in the real-time electronic logbook within two (2) years from the date of its entry unless the transaction record is being used in an ongoing criminal investigation or criminal proceeding.

**History.** Acts 2007, No. 508, § 3.

#### **5-64-1111. Liability of pharmacy or pharmacist.**

(a) A pharmacy in this state is not liable civilly for a sale of ephedrine, pseudoephedrine, or phenylpropanolamine that occurs at another pharmacy in this state.

(b) A pharmacy or pharmacist is not civilly liable for a determination made under § 5-64-1103(c) or for any refusal to dispense, sell, transfer, or otherwise furnish ephedrine, pseudoephedrine, or phenylpropanolamine based on a determination of age or identity.

**History.** Acts 2007, No. 508, § 3; 2011, No. 588, § 5.

**5-64-1112. Penalty for unauthorized disclosure and unauthorized access.**

- (a) A person commits an offense if he or she knowingly:
  - (1) Releases or discloses to any unauthorized person any confidential information collected and maintained under § 5-64-1107 or § 5-64-1108; or
  - (2) Obtains confidential information for a purpose not authorized by § 5-64-1107 or § 5-64-1108.
- (b) A violation of subsection (a) of this section is a Class A misdemeanor.

**History.** Acts 2007, No. 508, §, 3.

**5-64-1113. Pharmacist-authorized drugs.**

- (a) The Arkansas State Board of Pharmacy may adopt rules creating and adding to a list of additional nonprescription drugs that are subject to the same restrictions as are imposed for ephedrine, pseudoephedrine, or phenylpropanolamine under §§ 5-64-1103(c), 5-64-1103(d)(4), and 5-64-1104.
- (b) A pharmacy or a pharmacist has the same immunity from civil liability with regard to actions regarding nonprescription drugs under subsection (a) of this section as is provided under § 5-64-1111 for actions concerning ephedrine, pseudoephedrine, or phenylpropanolamine.

**History.** Acts 2011, No. 588, § 6; 2013, No. 1125, § 16.

**Amendments.** The 2013 amendment, in (a), inserted “creating and” and “of” and

substituted “§§ 5-64-1103(c), 5-64-1103(d)(4), and 5-64-1104” for “§§ 5-64-1103(c) and (d)(4) and § 5-64-1104”.

**SUBCHAPTER 12 — NITROUS OXIDE**

SECTION.	SECTION.
5-64-1201. Possession.	5-64-1203. Exemptions.
5-64-1202. Distribution.	

**Cross References.** Application for dental use permit, § 17-82-503.

**5-64-1201. Possession.**

- (a) It is unlawful for any person to possess a substance listed in subsection (b) of this section:
  - (1) With the intent to breathe, inhale, ingest, or use the substance for the purpose of:



(A) Causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses; or

(B) In any manner changing, distorting, or disturbing his or her audio, visual, or mental processes; or

(2) Who purposely is under the influence of the substance.

(b) This subchapter applies to the following substances:

(1) Nitrous oxide, commonly known as “laughing gas”;

(2) Any compound, liquid, or chemical that contains nitrous oxide; or

(3) Any amyl nitrite, commonly known as “poppers” or “snappers”.

(c) Upon conviction, a person who violates this section is guilty of a Class A misdemeanor.

**History.** Acts 1997, No. 355, § 1; 2001, No. 1553, § 13; 2007, No. 827, § 72.

### 5-64-1202. Distribution.

(a) It is unlawful for any person, firm, corporation, limited liability company, or association to purposely sell, offer for sale, distribute, or give away a substance listed in § 5-64-1201(b) for the purpose of inducing or aiding another person to breathe, inhale, ingest, use, or be under the influence of the substance for a purpose prohibited in § 5-64-1201.

(b) Upon conviction, a person, firm, corporation, limited liability company, or an association that violates this section is guilty of a Class A misdemeanor.

**History.** Acts 1997, No. 355, § 2; 2001, No. 1553, § 14; 2007, No. 827, § 73.

### 5-64-1203. Exemptions.

(a) A prohibitive provision in this subchapter does not apply to the possession and use of a substance listed in § 5-64-1201(b) that is prescribed as part of the practice of dentistry or as part of the care or treatment of a disease, condition, or injury by a licensed physician or to its use as part of a manufacturing process or industrial operation.

(b) A prohibitive provision in this subchapter shall not apply to the possession, use, or sale of nitrous oxide as a propellant in food preparation for restaurant, food service, or a houseware product.

**History.** Acts 1997, No. 355, § 3; 2007, No. 827, § 74.

## SUBCHAPTER 13 — ANHYDROUS AMMONIA

### SECTION.

5-64-1301. Possession of anhydrous ammonia in unlawful container.

### SECTION.

5-64-1302. Agricultural use as affirmative defense.

5-64-1303. Applicability of subchapter.

**5-64-1301. Possession of anhydrous ammonia in unlawful container.**

Any person who knowingly possesses anhydrous ammonia in a container that does not comply with the regulations of the Boiler Inspection Division of the Department of Labor for the containment of anhydrous ammonia is guilty of a Class B felony.

**History.** Acts 1999, No. 909, § 1.

**CASE NOTES**

**Cited:** Dondanville v. State, 85 Ark. App. 532, 157 S.W.3d 571 (2004).

**5-64-1302. Agricultural use as affirmative defense.**

It is an affirmative defense to prosecution under this subchapter that a chemical is possessed for the sole purpose of agricultural use.

**History.** Acts 1999, No. 909, § 2.

**5-64-1303. Applicability of subchapter.**

The provisions of this subchapter do not apply to a trained chemist working in a properly equipped research laboratory in an education, government, or corporate setting.

**History.** Acts 1999, No. 909, § 3.

**CHAPTER 65**

**DRIVING OR BOATING WHILE INTOXICATED**

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. CHEMICAL ANALYSIS OF BODY SUBSTANCES.
- 3. UNDERAGE DRIVING OR BOATING UNDER THE INFLUENCE LAW.
- 4. ADMINISTRATIVE DRIVER’S LICENSE SUSPENSION.

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**Publisher’s Notes.** Acts 2015, No. 299, § 6 inserted “or Boating” in the chapter heading.

**RESEARCH REFERENCES**

<b>Am. Jur.</b> 7A Am. Jur. 2d, Auto., § 356 et seq. 12 Am. Jur. 2d, Boats, §§ 70-72.	<b>C.J.S.</b> 61A C.J.S., Motor Veh., § 1574 et seq.
<b>Ark. L. Rev.</b> Notes, State v. Brown: Use of Prior Uncounseled Convictions to Enhance for Subsequent Offenses Under the Omnibus DWI Act, 38 Ark. L. Rev. 688.	<b>U. Ark. Little Rock L.J.</b> Arkansas Law Survey, Antley, Criminal Law, 9 U. Ark. Little Rock L.J. 119. Survey — Criminal Procedure, 10 U. Ark. Little Rock L.J. 567.

## SUBCHAPTER 1 — GENERAL PROVISIONS

## SECTION.

- 5-65-101. Title.
- 5-65-102. Definitions.
- 5-65-103. Driving or boating while intoxicated.
- 5-65-104. Seizure, suspension, and revocation of license — Temporary permits — Ignition interlock restricted license.
- 5-65-105. Operation of motor vehicle during period of license suspension or revocation.
- 5-65-106. Impoundment of license plate.
- 5-65-107. Persons arrested to be tried on charges — No charges reduced — Filing citations.
- 5-65-108. No probation prior to adjudication of guilt.
- 5-65-109. Presentencing report.
- 5-65-110. Record of violations and court actions — Abstract.

## SECTION.

- 5-65-111. Sentencing — Periods of incarceration — Exception.
- 5-65-112. Fines.
- 5-65-113. [Repealed.]
- 5-65-114. Inability to pay — Alternative public service work.
- 5-65-115. Alcohol treatment or education program — Fee.
- 5-65-116. [Repealed.]
- 5-65-117. Seizure and sale of a motor vehicle or motorboat.
- 5-65-118. Additional penalties — Ignition interlock devices.
- 5-65-119. Distribution of fee.
- 5-65-120. Restricted driving permit.
- 5-65-121. Victim impact panel attendance — Fee.
- 5-65-122. [Repealed.]
- 5-65-123. Offenses involving a motor vehicle equipped with an ignition interlock device.

**Effective Dates.** Acts 1983, No. 549, § 19: Mar. 21, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this state, and that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior. Further, it is found that increased income derived from the levying of such penalties can best be utilized to provide immediate alcohol and drug safety and rehabilitation and treatment programs both to prevent an increase in the use of intoxicating alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval." Emergency clause held valid in *State v. Ziegenbein*, 282 Ark. 162, 666 S.W.2d 698 (1984).

Acts 1983, No. 918, § 16: Mar. 30, 1983. Emergency clause provided: "It is hereby

found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this state, and that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior. Further, it is found that increased income derived from the levying of such penalties can best be utilized to provide immediate alcohol and drug safety and rehabilitation and treatment programs both to prevent an increase in the use of intoxicating alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1985, No. 113, § 3: Feb. 14, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that Section 13 of Act 549 of 1983 prescribed only minimum periods of suspension of motor vehicle operator licenses upon first and subsequent offenses of driv-



ing while intoxicated and contain no maximum periods of suspension; that as a result of one or more lower court decisions in the State, serious concern has arisen concerning the constitutionality of the Legislature prescribing only minimum periods of suspension and prescribing no maximum periods; that this Act is designed to prescribe minimum and maximum periods of motor vehicle operator license suspension for violations of Act 549 of 1983 and should be given effect immediately in order to remove constitutional doubt concerning the license suspension provisions of that Act. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 9: Mar. 27, 1995: Emergency clause provided: "It is hereby found and determined by the General Assembly that this act provides for administrative revocation and suspension of drivers' licenses for persons charged with the offense of driving while intoxicated; that based on Arkansas Crime Information Center statistics on DEI arrests, the Office of Driver Services could anticipate up to sixteen thousand (16,000) hearings if everyone arrested requested a hearing; that funds will be necessary for additional staff to handle this program along with significant costs to prepare for and implement this program; and that this act is necessary immediately in order to insure that sufficient funds are available for the financial stability of this program. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 5(a): Sections 1, 3, and 4 effective for all arrests or offenses occurring on or after July 1, 1996.

Acts 1995, No. 802, § 5(b): Section 2 effective July 1, 1995.

Acts 1995, No. 1032, § 13: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly, that in order for the Department of Health to become more efficient in accounting and budgetary practices due to the transfer of the Bureau of Alcohol and Drug Abuse Prevention,

changes in various funds are needed; and that the provisions of this Act provide such changes. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 830, § 5: Mar. 26, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act provides for proof of attendance at and completion of an alcohol education or treatment program as a prerequisite for reinstatement of a license administratively suspended or revoked; that the law does not now explicitly authorize such programs for administrative suspension or revocation; that lives will be placed in jeopardy if individuals whose license has been administratively suspended or revoked are not required to furnish proof of attendance of such programs prior to reinstatement of license; that rehabilitation of DWI offenders whose license has been administratively suspended or revoked is necessary for the welfare of the offender as well as others utilizing this State's roadways. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration o

the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 1325, § 7: Apr. 10, 1997. Emergency clause provided: "It is hereby found and determined by the Eighty-First General Assembly of the State of Arkansas that current ambiguities in Arkansas law create confusion and possible conflicts which would endanger the enforcement of certain DWI penalties; that enforcement of driving while intoxicated laws serves as an extreme deterrent to that kind of conduct which threatens the health and safety of Arkansas' driving public; and that these clarifications of Arkansas law should take effect immediately to prevent any possible forestalling of the enforcement of Arkansas DWI laws. Therefore, in order to remove the ambiguities in those important laws, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved or vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1508, § 19: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act makes various technical corrections in the Arkansas Code; that this act further clarifies the law to provide that the Arkansas Code Revision Commission may correct errors resulting from enactments of prior sessions; and that this act should go into effect immediately in order to be applicable during the codification process of the enactments of this regular session. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by

the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 1715, § 2: emergency clause failed to pass. Emergency clause provided: "It is found and determined by the General Assembly that there is a substantial risk that persons convicted of driving while intoxicated will continue to drive while their licenses are suspended. Stiffening penalties will reduce the occurrences of driving under suspended licenses, thus making the state's highways safer. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 1001, § 5: Apr. 1, 2003: Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the state is experiencing severe revenue shortages which are affecting the operation of many state agencies; that the Department of Arkansas State Police has been hit hard by these shortages which have hampered its ability to replace worn out automobiles and other equipment, not to mention its ability to attract recruits because beginning salaries have remained below average; and that this act is immediately necessary because it provides some much needed additional monies to the Department of Arkansas State Police and should be given immediate effect. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2003, No. 1462, § 4: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly



of the State of Arkansas that if the fees that are raised by this bill do not become effective by July 1, 2003, there will be a shortfall in the funding needed to maintain the alcoholism education programs; that these programs are mandated by law for those individuals that have their license suspended or revoked following an arrest for driving while intoxicated; and that these programs provide educational instruction and are necessary to protect the public health and welfare. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2003."

Acts 2005, No. 1992, § 6: Apr. 11, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that currently there exists some confusion as to whether the fees collected for the reinstatement of a suspended or revoked driver's license should be collected for each offense or for each reinstatement; that due to the confusion, state agencies have not been allowed to collect the revenue that they anticipated for reinstatement fees which is causing a negative fiscal impact; and that this act is immediately necessary to clarify the law to prevent the impairment of agency operations due to a loss of anticipated revenue. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2014, No. 277, § 16: July 1, 2014. Emergency clause provided: "It is found and determined by the General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a one (1) year period; that the effectiveness of this Act on July 1, 2014 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the legislative session, the delay in the effective date of this Act beyond July 1, 2014 could work irreparable harm upon the proper admin-

istration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 2014."

Acts 2015 (1st Ex. Sess.), No. 6, § 7: May 29, 2015 and July 22, 2015. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Supreme Court of Arkansas held in *Leeka v. State*, 2015 Ark. 183 (2015), that in order to sustain a conviction for driving while intoxicated, the state must prove that the defendant had a reckless mental state despite the statute not expressly requiring that the defendant's mental state be proven; that the General Assembly intended and still intends to keep driving while intoxicated a strict liability offense requiring no culpable mental state; that the General Assembly passed and the Governor signed Act No. 299 during the 2015 Regular Session which amended § 5-65-103 by combining the offenses of driving while intoxicated and boating while intoxicated; that Act 299 also amended § 5-65-303 by combining the offenses of underage driving under the influence and underage boating under the influence; that Act No. 299 does not become effective until July 22, 2015; that the new offenses of driving and boating while intoxicated and driving or boating under the influence while underage are strict liability offenses requiring no culpable mental state; that Sections 2, 3, and 5 of this act are necessary because the offenses of driving while intoxicated and underage driving under the influence should not have an applicable culpable mental state as they are strict liability offenses; and that Sections 4 and 6 of this act are necessary because the offenses of driving or boating while intoxicated and underage driving or boating under the influence should not have an applicable culpable mental state as they are strict liability offenses. Therefore, an emergency is declared to exist, and:

"(1) Sections 2, 3, and 5 of this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

"(A) The date of its approval by the Governor;



“(B) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

“(C) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto; and

“(2) Sections 4 and 6 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 22, 2015.”

RESEARCH REFERENCES

**ALR.** Reckless driving as lesser included offense of driving while intoxicated or similar charge. 10 A.L.R.4th 1252.

Failure to restrain drunk driver as ground of liability of state or local government unit or officer. 48 A.L.R.4th 320.

Validity of police roadblocks or check-

points for purpose of discovery of alcoholic intoxication — post-Sitz cases. 74 A.L.R.5th 319.

Validity of routine roadblocks by state or local police for purpose of discovery of driver’s license, registration, and safety violations. 116 A.L.R.5th 479.

CASE NOTES

ANALYSIS

Purpose.  
Liability.

**Purpose.**  
The General Assembly’s intent when enacting this subchapter was to protect the public from the damage and tragedies that drunken driving can cause; the fact that an offender is not on a roadway is irrelevant. *Fitch v. State*, 313 Ark. 122, 853 S.W.2d 874 (1993).

**Liability.**  
Liability not imposed on those who sell intoxicants for injuries caused by those who drink intoxicants. *Yancey v. Beverage House of Little Rock, Inc.*, 291 Ark. 217, 723 S.W.2d 826 (1987), overruled, *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997).

**Cited:** *Deweese v. State*, 26 Ark. App. 126, 761 S.W.2d 945 (1988).

5-65-101. Title.

This chapter shall be known as the “Omnibus DWI or BWI Act”.

**History.** Acts 1983, No. 549, § 1; A.S.A. 1947, § 75-2501; 2007, No. 214, § 1; 2015, No. 299, § 6.

**Amendments.** The 2015 amendment

inserted “or BWI” in the section heading and text; and substituted “chapter” for “act”.

CASE NOTES

ANALYSIS

Purpose.  
Legislative Intent.

**Purpose.**  
The legislative intent of the Omnibus DWI Act of 1983, as stated in former subsection (c), was to enhance penalties by using convictions under the prior driv-

ing while under the influence act; thus, previous convictions for driving while under the influence of intoxicants under prior law may be used as prior offenses for enhancement purposes. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

**Legislative Intent.**  
The legislature has always considered DWI to be a traffic offense and only re-

moved it from the list of traffic offenses under § 27-50-302 when DWI became the focus of an entire act within itself. *Hill v. State*, 315 Ark. 297, 868 S.W.2d 44 (1993).

**Cited:** *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984); *Spicer v. City of Fayetteville*, 284 Ark. 315, 681 S.W.2d 369 (1984); *Doty v. State*, 285 Ark. 270, 686

S.W.2d 413 (1985); *Sides v. State*, 285 Ark. 323, 686 S.W.2d 434 (1985); *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985); *Wilson v. State*, 286 Ark. 430, 692 S.W.2d 620 (1985); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986).

## 5-65-102. Definitions.

As used in this chapter:

(1)(A) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VI.

(B) The fact that any person charged with a violation of this chapter is or has been entitled to use that drug or controlled substance under the laws of this state does not constitute a defense against any charge of violating this chapter;

(2) "Ignition interlock device" means a device that connects a motor vehicle ignition system to a breath-alcohol analyzer and prevents a motor vehicle ignition from starting if a driver's blood alcohol level exceeds the calibration setting on the device;

(3) "Influence", with respect to an underage driver, means being controlled or affected by the ingestion of an alcoholic beverage or similar intoxicant, or any combination of an alcoholic beverage or similar intoxicant, to such a degree that the underage driver's reactions, motor skills, and judgment are altered or diminished, even to the slightest scale, and the underage driver, due to inexperience and lack of skill, constitutes a danger of physical injury or death to himself or herself or another person;

(4) "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself or herself or another person;

(5)(A) "Motorboat" means any vessel operated upon water and that is propelled by machinery, whether or not the machinery is the principal source of propulsion.

(B) "Motorboat" includes personal watercraft as defined in § 27-101-103(10);

(6) "Sworn report" means a signed and written statement of a certified law enforcement officer, under penalty of perjury, on a form provided by the Director of the Department of Finance and Administration;

(7) "Underage" means any person who is under twenty-one (21) years of age;

(8) "Victim impact statement" means a voluntary written or oral statement of a victim, or relative of a victim, who has sustained serious injury due to a violation of this chapter; and

(9) "Waters of this state" means any public waters within the territorial limits of the State of Arkansas.

**History.** Acts 1983, No. 549, § 2; A.S.A. 1947, § 75-2502; Acts 1987, No. 765, § 1; 1997, No. 1325, § 1; 2015, No. 299, § 6.

**Publisher's Notes.** Schedules I through VI referred to in this section exist pursuant to the Uniform Controlled Substances Act, § 5-64-101 et seq. The schedules are partly codified and partly governed by administrative regulation. The Director of the Department of Health or his or her authorized agent revises and republishes the schedules annually. For a

copy of the most recent rescheduling of controlled substances, contact the Department of Health.

**Amendments.** The 2015 amendment inserted (2), (3), (5), (7), and (9), and redesignated the existing subdivisions accordingly; substituted "chapter" for "act" throughout the section; and substituted "or herself or another person" for "and other motorists or pedestrians" in present (4).

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — Criminal Law, 10 U. Ark. Little Rock L.J. 559.

## CASE NOTES

### ANALYSIS

Constitutionality.

Intoxicated.

—In General.

—Evidence.

—Intoxicant.

### Constitutionality.

The term "intoxicant" as used in subdivision (1) (now (4)) of this section is not unconstitutionally vague. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

### Intoxicated.

#### —In General.

Due process requires only fair warning, not actual notice; the definition of "intoxicated" in this section fairly warns a person of ordinary intelligence that he is in jeopardy of violating the law if he drives a motor vehicle after consuming a sufficient quantity of alcohol to alter his reactions, motor skills and judgment to the extent that his driving constitutes a substantial danger to himself or others. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

A law is held to be vague when it leaves the police or the factfinder free to decide, without a fixed standard, what is prohibited; the definition of intoxicated, set out in this section, is a sufficient standard for

police enforcement and for ascertainment of guilt. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

The driver's skills under normal conditions are immaterial; it is driving with those skills impaired by intoxication to the extent that it causes the danger outlined in this section that brings the driver within the proscribed activity. *Oliver v. State*, 284 Ark. 413, 682 S.W.2d 745 (1985).

#### —Evidence.

Evidence held sufficient to find that the defendant was intoxicated. *Oliver v. State*, 284 Ark. 413, 682 S.W.2d 745 (1985); *Sparks v. State*, 25 Ark. App. 190, 756 S.W.2d 911 (1988); *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988).

The crime of DWI is committed whether the act is violated by a motorist who is intoxicated or by a motorist whose blood alcohol level is in excess of the legal limit; these two conditions are two different ways of proving a single violation, and proof by chemical test that the motorist's blood alcohol content was in excess of the legal limit is admissible as evidence tending to prove intoxication. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

Evidence of DWI, fifth offense, held sufficient where defendant refused to submit



to a breathalyzer test, failed field sobriety tests, and the officers testified that they smelled intoxicants on defendant's person. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

If the refusal to be tested is admissible evidence on the issue of intoxication, as defined in this section, and may indicate the defendant's fear of the results of the test and the consciousness of guilt, then a defendant's attempts to prevent accurate testing surely may be considered as similar proof of guilt; the court's decision does not turn on whether an appellant's efforts to interfere with testing were or could have been successful and even futile efforts to interfere with blood-alcohol testing may be considered as proof of guilt. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under § 5-65-206(a)(2), a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication. Based on the eyewitness testimony, defendant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in this section, and (1) the jury could have discounted testimony by defendant's son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Sufficient evidence supported a finding defendant was intoxicated, as defined in this section, for purposes of a charge of fourth offense driving while intoxicated because defendant was in possession of four bottles of controlled substances at the

time of an accident, several witnesses, including a police officer, testified about defendant's substantial impairment immediately after the accident, and defendant had a positive drug screen for a controlled substance. *Henry v. State*, 2011 Ark. App. 169, 378 S.W.3d 832 (2011).

Sufficient evidence supported defendant's conviction for driving while intoxicated (DWI) where the evidence showed that: (1) defendant was driving his car erratically, causing him to leave the highway; (2) defendant was either passed out or unresponsive with his foot still on the accelerator and a tire spinning; (3) the police had to help defendant out of his car, and he was unsteady and unable to walk or stand on his own; (4) a police officer described defendant as being in a daze with slurred speech; (5) defendant's car smelled of marijuana, it contained a partially-smoked joint, and defendant told the police he had been smoking marijuana as well as ingesting large amounts of cold medicine; and (6) defendant testified at trial that he had been smoking marijuana immediately before operating his vehicle that evening. From the evidence presented, the jury could conclude with reasonable certainty that defendant's use of marijuana influenced him to such a degree that he presented a clear and substantial danger of physical injury to himself and others. *Morton v. State*, 2011 Ark. App. 432, 384 S.W.3d 585 (2011).

Evidence was sufficient to sustain defendant's conviction for driving while intoxicated because defendant was seen driving erratically, and her urine test came back positive for drugs; the positive drug screen, admission of taking drugs that were known by defendant to be contraindicated with operating a motor vehicle, and the observed reckless driving were sufficient evidence to show defendant was intoxicated. *Carruth v. State*, 2012 Ark. App. 305 (2012).

Trial court did not give the field sobriety tests predominant weight and instead relied on other factors in finding defendant guilty, including the arresting officer's opinion that defendant was intoxicated; although defendant offered alternative explanations for the factors relied on by the trial court as evidence of his guilt, the weight of the evidence and the credibility of the witnesses were matters for the trial

court. *Rule v. State*, 2014 Ark. App. 390, 438 S.W.3d 279 (2014).

Directed verdict was properly denied as to a driving while intoxicated charge where defendant's vehicle was in a ditch as a result of a one-car accident, he failed three field sobriety tests, he had taken prescription medication, and a drug-recognition expert testified that he was affected by a central nervous system stimulant. *Fiveash v. State*, 2015 Ark. App. 187, 458 S.W.3d 774 (2015).

In a driving while intoxicated case, the evidence was sufficient to support the conviction where a corporal smelled intoxicants in defendant's car, he observed an empty beer can on the floor of the vehicle, and he noticed that defendant's eyes were bloodshot and watery. Defendant refused to take a breathalyzer test, performed poorly on field tests, and admitted to drinking beer before the stop; moreover, the corporal considered defendant to be intoxicated and a danger to other drivers. *Reardon v. State*, 2015 Ark. App. 583, 473 S.W.3d 575 (2015).

#### —Intoxicant.

The addition of the term "any intoxicant" to "alcohol, a controlled substance,

or a combination thereof" has not made the definition vague; a person of ordinary intelligence knows that the use of a substance tending to put him or her in the condition described in subdivision (2) (now (4)) of this section constitutes use of an "intoxicant" and that being in control of a motor vehicle shortly thereafter may violate the law. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

The General Assembly has recognized in § 5-60-116 that toluene is an intoxicant. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

**Cited:** *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985); *Townsend v. State*, 292 Ark. 157, 728 S.W.2d 516 (1987); *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989); *Freeman v. City of DeWitt*, 301 Ark. 581, 787 S.W.2d 658 (1990); *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993); *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996); *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

### 5-65-103. Driving or boating while intoxicated.

(a)(1) It is unlawful and punishable as provided in this chapter for a person who is intoxicated to operate or be in actual physical control of a motorboat on the waters of this state or a motor vehicle.

(2) It is unlawful and punishable as provided in this chapter for a person to operate or be in actual physical control of a motorboat on the waters of this state or a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight hundredths (0.08) or more based upon the definition of alcohol concentration in § 5-65-204.

(b) The consumption of alcohol or the possession of an open container of alcohol aboard a motorboat does not in and of itself constitute probable cause that the person committed the offense of boating while intoxicated.

(c) An alcohol-related offense under this section is a strict liability offense.

**History.** Acts 1983, No. 549, § 3; A.S.A. 1947, § 75-2503; Acts 2001, No. 561, § 2; 2013, No. 361, § 2; 2015, No. 299, § 6; 2015 (1st Ex. Sess.), No. 6, §§ 3, 4.

**A.C.R.C. Notes.** Acts 2015 (1st Ex.

Sess.), No. 6, § 1, provided: "Legislative intent.

"(a) It is the intent of the General Assembly with this act to address the Supreme Court's holding in *Leeka v. State*,

2015 Ark. 183 (2015), that the state must prove a culpable mental state in a prosecution for driving while intoxicated.

“(b) The General Assembly intends for this act to establish that the current offenses of driving while intoxicated and underage driving under the influence, as well as the offenses of driving or boating while intoxicated and driving or boating under the influence while underage that were created by Acts 2015, No. 299, § 6, be strict liability offenses, which are offenses that require no culpable mental state be proven.”

**Publisher’s Notes.** Acts 2015 (1st Ex. Sess.), No. 6, § 4 specifically amended

this section as amended by Acts 2015, No. 299.

**Amendments.** The 2013 amendment substituted “chapter” for “act” twice; and substituted “alcohol” for “breath, blood, and urine” following “definition of” in (b) (now (a)(2)).

The 2015 amendment by No. 299 substituted “Driving or boating while intoxicated” for “Unlawful acts” in the section heading; redesignated former (a) as (a)(1) and former (b) as (a)(2); in (a)(1) and (a)(2), substituted “a person” for “any person” and inserted “motorboat on the waters of this state or a”; and added (b).

The 2015 (1st Ex. Sess.) amendment by No. 6 added (c).

## RESEARCH REFERENCES

**ALR.** Vertical gaze nystagmus test: Use in impaired driving prosecution. 117 A.L.R.5th 491.

Claim of diabetic reaction or hypoglycemia as defense in prosecution for driving while under influence of alcohol or drugs. 17 A.L.R.6th 757.

**U. Ark. Little Rock L.J.** Survey — Criminal Law, 12 U. Ark. Little Rock L.J. 183.

Seventeenth Annual Survey of Arkansas Law — Constitutional Law, 17 U. Ark. Little Rock L.J. 450.

## CASE NOTES

### ANALYSIS

Constitutionality.  
In General.  
Construction.  
All-Terrain Vehicles.  
Authority to Arrest.  
Burden of Proof.  
Charging Document, Citation, Etc.  
Competency for Other Purposes.  
Double Jeopardy.  
Elements of Offense.  
Evidence.  
—In General.  
—Confessions.  
—Intoxicated.  
—Police.  
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Evidence Sufficient.  
Horizontal Gaze Nystagmus Test.  
Instructions.  
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Legislative Intent.  
Lesser-Included Offenses.  
Mental State.  
Operation or Control of Vehicle.  
Place of Operation.

Portable Breath Test.  
Probable Cause.  
Prohibited Conduct.  
Right to Counsel.  
Separate Offenses.

### Constitutionality.

The Omnibus DWI Act of 1983 is not unconstitutional on its face or as applied, in that subsection (b) (see now (a)(2)) establishes a conclusive presumption of guilt. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Subsection (b) (see now (a)(2)) is not void for vagueness. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

Subsection (b) (see now (a)(2)) meets due process requirements. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The blood alcohol measurement standard in subsection (b) (see now (a)(2)) bears a reasonable relationship to the legitimate state interest in protecting the safety of its citizens. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The state has a rational basis in protect-



ing public safety, and to that end, the General Assembly has determined that a driver with a blood alcohol content of .10% or more constitutes a serious and immediate threat to the safety of all citizens; the Omnibus DWI Act of 1983 is simply a reasonable means of protecting the public safety. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The Omnibus DWI Act is not unconstitutional on the ground that a machine rather than a jury of peers is the basis for the conviction since it is up to the jury to determine whether the defendant was operating a motor vehicle and whether his blood alcohol content was in fact greater than the statutorily set standard. *Girdner v. City of Kensett*, 285 Ark. 70, 684 S.W.2d 808 (1985).

Subsection (a) (now (a)(1)) is not unconstitutionally vague. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

Subsection (b) (see now (a)(2)) which makes it a violation per se to drive with a blood alcohol content of .10% or more is not unconstitutionally vague. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

### In General.

City attorney of a first-class city had authority to prosecute a state misdemeanor violation because he was acting as a de facto official. *Chronister v. State*, 55 Ark. App. 93, 931 S.W.2d 444 (1996).

### Construction.

Under § 5-65-206(a)(2), if a person's blood alcohol content is lower than that required by subsection (b) (see now (a)(2)) of this section, other competent evidence may be used to show intoxication under subsection (a) (now (a)(1)). *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Although defendant was charged with DWI second offense but convicted instead of DWI first offense, the defendant was not acquitted of the "charge" of DWI second offense under § 5-65-104; once the municipal court convicted defendant of DWI first offense, he simply had two separate convictions of violating this section, since DWI first offense is just as much a violation of this section as is DWI second offense. *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

Critical point for counting driving while intoxicated (DWI) offenses is at the sentencing phase of the DWI case, not the date that the crime is committed, and § 5-65-111 plainly contemplates determining total DWI offenses within five years of the first offense and, to the extent Ark. Model Jury Instruction Crim. § 2d 9201.4 is in conflict with the method of counting prior offenses, § 5-65-111 prevails. *State v. Sola*, 354 Ark. 76, 118 S.W.3d 95 (2003).

Subsection (b) (now (a)(2)), as amended in 2001, sets the legal limit for blood alcohol concentration and must be read in conjunction with § 5-65-204(a)(1), which defines the alcohol concentration computation; hence, where defendant stipulated that his blood alcohol concentration as revealed in breathalyzer test results was 0.109, his conviction for per se violation of subsection (b) (now (a)(2)) was affirmed on appeal. *Bramlett v. State*, 356 Ark. 200, 148 S.W.3d 278 (2004).

### All-Terrain Vehicles.

An all-terrain vehicle meets the definition of a motor vehicle as set out in § 27-14-207, since all-terrain vehicles are self-propelled and do not require rails; the term motor vehicle, as used in this section, also includes all-terrain vehicles. *Fitch v. State*, 313 Ark. 122, 853 S.W.2d 874 (1993).

### Authority to Arrest.

After seeing appellant and smelling intoxicants, an officer had the authority to arrest appellant for driving while intoxicated. *Ward v. State*, 2012 Ark. App. 649 (2012).

There was reasonable cause for defendant's arrest for DWI under this section, because the trooper's observations of defendant's driving, his demeanor, and the odor of alcohol led him to believe that defendant was driving under the influence of intoxicants and was a danger to himself or others. The trooper administered two tests to defendant, both of which registered a blood-alcohol content of .12 percent; therefore, there was substantial evidence to support his DWI conviction. *Lewis v. State*, 2013 Ark. App. 39 (2013).

### Burden of Proof.

Subsection (b) (see now (a)(2)) does not lessen the state's burden of proof, and each defendant is presumed innocent un-

til the state proves beyond a reasonable doubt that he is guilty of committing the prohibited act of driving with .10% or more alcoholic content in the blood. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Subsection (b) (see now (a)(2)) does not deprive the accused of the presumption of innocence by shifting the burden of proof to the defendant and creating an irrebuttable presumption of guilt, for each defendant is presumed innocent until the state proves beyond a reasonable doubt that he is guilty of committing the prohibited act of driving with .10% or more alcoholic content in the blood. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

The state must prove not only that defendant was intoxicated, but also that he operated or was in actual physical control of a motor vehicle while intoxicated. *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988).

To convict defendant of driving while intoxicated the state has to prove that defendant was driving or in actual physical control of a motor vehicle, that defendant's driving skills were sufficiently impaired to create a substantial danger to himself and others, and that the impaired driving skills were the result of the ingestion of a controlled substance. *Roach v. State*, 30 Ark. App. 119, 783 S.W.2d 376 (1990).

This section does not require that law enforcement officers actually witness an intoxicated person driving or exercising control of a vehicle; it is well-settled that the state may prove by circumstantial evidence whether a person operated or was in actual physical control of a vehicle. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

In a driving while intoxicated case, the state is not required to prove that the defendant confessed or prove that she possessed an intent to drive drunk; contrary to defendant's claim, the state was not required to prove that a law enforcement officer actually witnessed the intoxicated person driving or exercising control over the vehicle, as the state could make that showing by circumstantial evidence. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

### **Charging Document, Citation, Etc.**

A charging document, which reflected that the defendant was "charged with the offense of Driving While Intoxicated (DWI) one" was sufficient for a conviction under either subsection (a) or (b) (see now (a)(1) or (a)(2)), even though the evidentiary requirements of the subsections are different. *Wilson v. State*, 285 Ark. 257, 685 S.W.2d 811 (1985).

Citations which charged defendant with "Driving Under the Influence of Intoxicants" were not void for lack of specificity in that they did not indicate under which subsection of this section of the Omnibus DWI Act the defendant was charged. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

Where the actual charge was "D.W.I. 5-65-103," and the citation did not specify either subsection of this section, since subsections (a) and (b) (see now (a)(1) and (a)(2)) are, legally, two different ways to prove a single violation, it does not matter if defendant is charged under subsection (b), but convicted under subsection (a). *Greer v. State*, 310 Ark. 522, 837 S.W.2d 884 (1992), overruled in part on other grounds, *Igwe v. State*, 312 Ark. 220, 849 S.W.2d 462 (1993).

A charge of "DWI one" is sufficient for a conviction under either subsection (a) or (b) (see now (a)(1) or (a)(2)), even though the evidentiary requirements of the subsections are different. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Municipal court erred and prejudiced defendant charged with driving while intoxicated (DWI) when it changed the charge to driving under the influence (DUI) on its own motion, because DUI is not a lesser-included offense of DWI and altering the charge violated § 5-65-107; and the circuit court erred in trying and convicting defendant of DUI following his appeal from the municipal court, a judgment it was not authorized to render under § 16-19-1105. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997), overruled in part, *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

Defendant's right to a speedy trial under Ark. R. Crim. P. 30.1 was violated when his trial for driving while intoxicated in violation of § 5-65-103 commenced on the 600th day following his arrest. *Zangerl v. State*, 352 Ark. 278, 100 S.W.3d 695 (2003).



**Competency for Other Purposes.**

Fact that defendant's blood alcohol level exceeded .10% at time of trial did not require conclusion under this section that he was too intoxicated to stand trial; this section provides that it is unlawful for any person to operate a motor vehicle if his blood alcohol level is .10 percent or more, but does not declare or imply that a person in such condition is incompetent for any other purposes. *Meekins v. State*, 34 Ark. App. 67, 806 S.W.2d 9 (1991).

**Double Jeopardy.**

Driving while intoxicated is an essential component of the crime of negligent homicide, since it is necessary to prove that defendant was driving while intoxicated in order to prove that he had committed negligent homicide; consequently, a defendant cannot be convicted of both offenses. *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993).

**Elements of Offense.**

Trial court properly provided copies of defendant's prior DWI convictions to the jury for their examination because the fact of prior DWI convictions was an element of the crime of DWI, fourth offense, to be determined by the jury; although the trial court had to determine the admissibility of evidence of the prior convictions, it was up to the jury to determine that the evidence established that element of the offense. *Fields v. State*, 81 Ark. App. 351, 101 S.W.3d 849 (2003).

Defendant admitted that he had drunk a six-pack of beer prior to his arrest, and the breath-alcohol test results on the Intoximeter indicated that defendant was over the legal limit of alcohol in that the test's final result was .125. In addition to the trooper's observations and defendant's failing three field sobriety tests, this constituted substantial evidence of intoxication to support defendant's conviction for driving while intoxicated. under this section. The state was not obligated to prove that defendant was driving erratically or posed a danger on the road. *Graham v. State*, 2012 Ark. App. 90, 389 S.W.3d 33 (2012).

**Evidence.****—In General.**

Evidence to show intoxication held admissible. *Canard v. State*, 174 Ark. 918,

298 S.W. 24 (1927) (decision under prior law); *Wiyott v. State*, 284 Ark. 399, 683 S.W.2d 220 (1985); *Yacono v. State*, 285 Ark. 130, 685 S.W.2d 500 (1985); *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988).

Evidence held sufficient to support conviction. *Oliver v. State*, 284 Ark. 413, 682 S.W.2d 745 (1985); *Broyles v. State*, 285 Ark. 457, 688 S.W.2d 290 (1985); *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985); *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987); *Deshazier v. State*, 26 Ark. App. 193, 761 S.W.2d 952 (1988); *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989); *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992); *Wilson v. State*, 46 Ark. App. 1, 875 S.W.2d 510 (1994); *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

Proof of the blood alcohol content is not necessary for a conviction under subsection (a) (now (a)(1)), driving while intoxicated; however, such proof is admissible as evidence tending to prove intoxication. *Wilson v. State*, 285 Ark. 257, 685 S.W.2d 811 (1985).

The erroneous admission of breathalyzer test results indicating that defendant's blood-alcohol level was 0.20% was prejudicial where, even though the trial judge said that he was not convicting defendant under subsection (b) (see now (a)(2)) but that the conviction was based instead upon subsection (a) (now (a)(1)), the judge did not say that he did not consider the test results. *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985).

The trial court did not err by admitting into evidence a breathalyzer log showing all tests performed on the machine for a period of five days, even though the defendant's blood alcohol content was the highest one recorded on it, where the log was admissible for the purpose of showing calibration of the machine and the defendant's test result, and the judge offered to admonish the jury to disregard the other test results or delete them, but the defendant rejected this offer. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

Subsection (b) (see now (a)(2)) of this section states that it is unlawful for a person to operate a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the



person's blood. However, § 5-65-204(a) states that percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

Officer's testimony was insufficient to establish that gaze nystagmus testing was reliable and generally accepted in the scientific community. *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989).

Evidence held insufficient to support conviction. *Roach v. State*, 30 Ark. App. 119, 783 S.W.2d 376 (1990); *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992).

Where defendant was involved in a one-vehicle accident, had a strong odor of alcohol about his person, his speech was slurred, and the deputy sheriff who questioned defendant testified that shortly after the accident defendant appeared to be "very drunk, very intoxicated," there was substantial evidence to sustain defendant's conviction without considering the result of the blood test. *Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990).

Evidence of DWI, second offense, held insufficient where the date of the prior offense was not on the docket sheet introduced into evidence. *Wilson v. State*, 46 Ark. App. 1, 875 S.W.2d 510 (1994).

Prosecutor's remark, "The reason we have this law is so people won't be out there killing our kids" fell well short of any error or prejudice requiring reversal. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

The crime of DWI is committed whether the act is violated by a motorist who is intoxicated or by a motorist whose blood alcohol level is in excess of the legal limit; these two conditions are two different ways of proving a single violation, and proof by chemical test that the motorist's blood alcohol content was in excess of the legal limit is admissible as evidence tending to prove intoxication. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

Although the police officers' testimony regarding their belief that defendant was intoxicated was described by the trial court as "subjective" evidence, it was the province of the jury to determine the weight and credibility of this evidence. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Where defendant was involved in a one-car accident, it was reasonable to infer that the defendant's impaired response could have been caused by his injuries, and, in light of this inference, the odor of alcohol was insufficient to support the conviction. *Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1998).

The State is not precluded as a matter of law from producing evidence of intoxication by ingestion of a controlled substance if the information did not specifically allege this method of intoxication. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

A DWI conviction is not dependent upon evidence of blood-alcohol content in view of sufficient other evidence of intoxication. *Wortham v. State*, 65 Ark. App. 81, 985 S.W.2d 329 (1999).

State failed to present evidence showing that defendant had a blood-alcohol content of 0.10 percent or greater such that there was not substantial evidence to convict defendant under subsection (b) (see now (a)(2)); however, there was substantial evidence to convict him under subsection (a) (now (a)(1)) as he was intoxicated and operated a vehicle while intoxicated. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

Although defendant was acquitted of refusal to consent to a breath test in the municipal court, where he appealed his conviction for driving while intoxicated (DWI) to the circuit court, the refusal was admissible as evidence showing knowledge or consciousness of guilt. *Etheredge v. State*, 89 Ark. App. 288, 202 S.W.3d 543 (2005).

Where defendant crossed the center line twice, the state trooper noticed that his breath smelled of alcohol, and he did not pass field-sobriety tests; within two hours of the traffic stop, defendant's breath-test results were more than 0.08. These facts alone were sufficient to support his conviction of driving while intoxicated pursuant to subsection (a) (now (a)(1)) of this section; defendant's claim that his alcohol level would have still been rising at the time of the offense and could have been peaking at the time of the tests was unsupported by the evidence. *Hayden v. State*, 103 Ark. App. 32, 286 S.W.3d 177 (2008).

**—Confessions.**

Pre-arrest statement by defendant charged with DWI that he was the driver of the vehicle was not a “confession” as that term is used in § 16-89-111(d), because defendant’s statement contained no admission that defendant was intoxicated or that his blood alcohol level was in excess of the legal limit at the time of the accident; defendant’s statement that he was the operator of the vehicle merely constituted an admission of one element of the offense of DWI, rather than a confession of the crime. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

**—Intoxicated.**

Any error by the circuit court in denying defendant’s motion in limine to exclude evidence or his refusal to submit to breath testing was harmless as the evidence of his guilt was overwhelming; defendant was passed out at the steering wheel, he could not pass field sobriety tests, and he admitted to drinking alcohol earlier in the evening. *Etheredge v. State*, 89 Ark. App. 288, 202 S.W.3d 543 (2005).

If the refusal to be tested is admissible evidence on the issue of intoxication, as defined in § 5-65-102, and may indicate the defendant’s fear of the results of the test and the consciousness of guilt, then a defendant’s attempts to prevent accurate testing surely may be considered as similar proof of guilt; the court’s decision does not turn on whether an appellant’s efforts to interfere with testing were or could have been successful and even futile efforts to interfere with blood-alcohol testing may be considered as proof of guilt. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Court rejected defendant’s claim of error in the denial of defendant’s motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant’s claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under § 5-65-206(a)(2), a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication. Based on the eyewitness testimony, defendant’s admission to drinking, her blood-alcohol reading, the failure of her field

tests, the manner in which she drove the vehicle, and the witnesses’ observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in § 5-65-102, and (1) the jury could have discounted testimony by defendant’s son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Trial court did not give the field sobriety tests predominant weight and instead relied on other factors in finding defendant guilty, including the arresting officer’s opinion that defendant was intoxicated; although defendant offered alternative explanations for the factors relied on by the trial court as evidence of his guilt, the weight of the evidence and the credibility of the witnesses were matters for the trial court. *Rule v. State*, 2014 Ark. App. 390, 438 S.W.3d 279 (2014).

In a driving while intoxicated case, the evidence was sufficient to support the conviction where a corporal smelled intoxicants in defendant’s car, he observed an empty beer can on the floor of the vehicle, and he noticed that defendant’s eyes were bloodshot and watery. Defendant refused to take a breathalyzer test, performed poorly on field tests, and admitted to drinking beer before the stop; moreover, the corporal considered defendant to be intoxicated and a danger to other drivers. *Reardon v. State*, 2015 Ark. App. 583, 473 S.W.3d 575 (2015).

**—Police.**

This section does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Springston v. State*, 61 Ark. App. 36, 962 S.W.2d 836 (1998).

Trial court erred in admitting evidence that the defendant failed a portable breath test and in admitting the result of a breathalyzer test taken later at a police station where the statutory requirements of §§ 5-65-206 and 5-65-204(d) regarding the administration of blood alcohol tests were not followed. *Daniels v. State*, 84 Ark. App. 263, 139 S.W.3d 140 (2003).



**—Sentencing.**

During the penalty phase of defendant's trial for driving while intoxicated in violation of this section and refusal to submit to a chemical test in violation of § 5-65-205, the trial court did not err by admitting evidence of his prior convictions for refusal to submit to a chemical test; the evidence was relevant to his sentencing as either character evidence or aggravating circumstances. *Williams v. State*, 2009 Ark. App. 554 (2009).

**Evidence Sufficient.**

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. *Estacuy v. State*, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Directed verdict was not appropriate because the testimony of a trooper that defendant was obviously impaired and that he had observed defendant's vehicle swerve on the highway, along with defendant's admission that he had consumed enough alcohol to register above the legal limit constituted substantial evidence sufficient to sustain defendant's conviction for third-offense driving while intoxicated. *Heathman v. State*, 2009 Ark. App. 601 (2009).

Sufficient evidence supported a finding defendant was intoxicated, as defined in § 5-65-102, for purposes of a charge of fourth offense driving while intoxicated in violation of subsection (a) (now (a)(1)) of this section, because defendant was in possession of four bottles of controlled substances at the time of an accident, several witnesses, including a police officer, testified about defendant's substantial impairment immediately after the accident, and defendant had a positive drug screen for a controlled substance. *Henry v. State*, 2011 Ark. App. 169, 378 S.W.3d 832 (2011).

A police officer credibly testified that there was a noticeable odor of alcohol in defendant's car, that defendant was so unsteady on her feet that he was afraid to conduct field-sobriety tests for fear of her

falling, and that she told him that she had consumed two beers after taking medication. Therefore, the evidence was sufficient to find her guilty of driving while intoxicated under subsection (a) (now (a)(1)) of this section. *Foster v. State*, 2012 Ark. App. 640 (2012).

Trial court properly denied defendant's motion for a directed verdict because there was substantial evidence supporting his conviction for operating a motor vehicle with a breath-alcohol concentration of .08 or more where the jury chose to believe that the breathalyzer machine used to test defendant's blood alcohol level was reliable after hearing evidence concerning the reliability of breathalyzer machines, in general, and the reliability of the machine used to test defendant, in particular, and defendant's breathalyzer-test results were above the legal limit. *Perrigen v. State*, 2015 Ark. App. 42 (2015).

**Horizontal Gaze Nystagmus Test.**

Using the horizontal gaze nystagmus test to identify a precise blood alcohol content under subsection (b) (see now (a)(2)) is vastly different from testing to indicate some alcohol in the system for purposes of intoxication under subsection (a) (now (a)(1)). *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

Where the horizontal gaze nystagmus test administered by police officer was not used to quantify a precise percentage of blood alcohol content but rather to show some indication of alcohol consumption in conjunction with other field sobriety tests, the testimony regarding the results of the test was properly admitted. *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

**Instructions.**

Under §§ 16-89-126(c) and 5-4-103, the defendant was entitled to have a jury fix his sentence for his conviction of driving while intoxicated, and his proffered jury instruction to this effect should have been given. *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Defendant was not prejudiced by trial court's refusal to instruct the jury to return separate verdicts for subsections (a) and (b) (see now (a)(1) and (a)(2)) since the penalty would be the same whether the act is violated by conduct described by (a)



or (b); the two conditions are simply two different ways of proving a single violation. *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996).

Trial court did not err in rejecting a DUI defendant's proffered jury instructions because the instructions' omission of any reference to chemical testing or chemical analysis failed to take into account this section's incorporation of § 5-65-204, which describes "the chemical analysis of a person's blood, urine, or breath." The model jury instruction represented a more accurate reflection of the law, although it did not address the 2001 amendment to this section, which had eliminated the phrase "as determined by a chemical test." *Graham v. State*, 2012 Ark. App. 90, 389 S.W.3d 33 (2012).

### **Intoxicated.**

The addition of the term "any intoxicant" to "alcohol, a controlled substance, or a combination thereof" has not made the definition vague; a person of ordinary intelligence knows that the use of a substance tending to put him or her in the condition described in present § 5-65-102 constitutes use of an "intoxicant" and that being in control of a motor vehicle shortly thereafter may violate the law. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

Evidence held sufficient to establish that the defendant was intoxicated where (1) 2 police officers smelled alcohol on the defendant's breath, (2) the defendant admitted that he consumed alcohol, and (3) although one officer could not recall the specifics of the field sobriety tests he conducted, he indicated that he administered 3 such tests and that the defendant failed all 3. *Felgate v. State*, 63 Ark. App. 76, 974 S.W.2d 479 (1998).

Evidence of intoxication held sufficient where the blood alcohol level shown by a breathalyzer test was .104, notwithstanding that the officer who administered the breathalyzer test testified that the breathalyzer machine had a plus or minus factor of .01 for the external check, and notwithstanding the contention that the defendant's blood alcohol level could thus have been as low as .094, since the officer also testified that the .01 factor had nothing to do with a personal sample. *Weeks v. State*, 64 Ark. App. 1, 977 S.W.2d 241 (1998).

Evidence of DWI, fifth offense, held sufficient where defendant refused to submit to a breathalyzer test, failed field sobriety tests, and the officers testified that they smelled intoxicants on defendant's person. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Sufficient evidence supported defendant's conviction for driving while intoxicated (DWI) under subsection (a) (now (a)(1)) of this section where the evidence showed that: (1) defendant was driving his car erratically, causing him to leave the highway; (2) defendant was either passed out or unresponsive with his foot still on the accelerator and a tire spinning; (3) the police had to help defendant out of his car, and he was unsteady and unable to walk or stand on his own; (4) a police officer described defendant as being in a daze with slurred speech; (5) defendant's car smelled of marijuana, it contained a partially-smoked joint, and defendant told the police he had been smoking marijuana as well as ingesting large amounts of cold medicine; and (6) defendant testified at trial that he had been smoking marijuana immediately before operating his vehicle that evening. From the evidence presented, the jury could conclude with reasonable certainty that defendant's use of marijuana influenced him to such a degree that he presented a clear and substantial danger of physical injury to himself and others. *Morton v. State*, 2011 Ark. App. 432, 384 S.W.3d 585 (2011).

Directed verdict was properly denied as to a driving while intoxicated charge where defendant's vehicle was in a ditch as a result of a one-car accident, he failed three field sobriety tests, he had taken prescription medication, and a drug-recognition expert testified that he was affected by a central nervous system stimulant. *Fiveash v. State*, 2015 Ark. App. 187, 458 S.W.3d 774 (2015).

### **Legislative Intent.**

It is evident from the history of § 27-49-102(2) that the legislature intended that the offense of DWI not be restricted to the highways of this state; the legislature has consistently intended that DWI constitutes a criminal offense whether it occurs on highways or on private property. *Hill v. State*, 315 Ark. 297, 868 S.W.2d 44 (1993).

### **Lesser-Included Offenses.**

Violation of the implied consent law is not a lesser-included offense of driving

while intoxicated, and the offense of driving while intoxicated is not a lesser-included offense of violation of the implied consent law. *Frana v. State*, 323 Ark. 1, 912 S.W.2d 930 (1996).

Driving under the influence (DUI) is not a lesser-included offense of driving while intoxicated, in that DUI requires an additional element of proof of the defendant's age and a different level of intoxication. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997), overruled in part, *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

#### **Mental State.**

The Omnibus Driving While Intoxicated Act of 1983 is valid even though it does not require a culpable mental state. *Price v. State*, 285 Ark. 148, 685 S.W.2d 506 (1985).

Circuit court erred in ruling that the Omnibus DWI Act of 1983 is a strict liability statute that does not require proof of a culpable mens rea; a culpable mental state has to be imputed to the DWI offense through the plain language of § 5-2-203, and the offense is not subject to the statutory exception in § 5-2-204(c)(2) because the offense is included in the Criminal Code. *Leeka v. State*, 2015 Ark. 183, 461 S.W.3d 331 (2015) (decision under prior law).

#### **Operation or Control of Vehicle.**

Defendant held to be in control of vehicle. *Walker v. State*, 241 Ark. 396, 408 S.W.2d 474 (1966) (decision under prior law); *Wiyott v. State*, 284 Ark. 399, 683 S.W.2d 220 (1985); *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985); *Altes v. State*, 286 Ark. 94, 689 S.W.2d 541 (1985); *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985); *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988).

The defendant held not to be in actual control of his vehicle. *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984) (decision under prior law).

There are three ways to prove operation of a motor vehicle: (1) observation by the officer; (2) evidence of intent to drive after the moment of arrest; or (3) a confession by the defendant that he was driving. *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985); *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992).

In a prosecution for driving while intoxicated, actual control of a vehicle by the

defendant may be proved by circumstantial evidence; the officer need not see the driver operating the car in order to have reasonable cause to believe he was doing so. *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985).

Where there was evidence that immediately after the impact, the defendant was in the driver's seat behind the steering wheel, that evidence alone constituted substantial evidence to support the finding that he was driving seconds before the time of impact. *Tumbs v. State*, 290 Ark. 214, 718 S.W.2d 105 (1986).

Investigatory stop of vehicle held justified. *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987).

Where defendant conceded that he was intoxicated, and the officer testified that defendant was found in the driver's position with the engine actually running, the jury could properly have concluded that he was in actual physical control of a motor vehicle. *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989).

It was error for the court to instruct the jury that it must find against defendant on the issue of control if it found that circumstances existed from which an inference of this element could be drawn. *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989).

To be guilty of DWI, it does not have to be shown that a defendant was driving the vehicle or driving the vehicle in a hazardous or negligent manner; in fact, it only requires a showing that the defendant was in actual physical control of the vehicle while intoxicated. *Beasley v. State*, 47 Ark. App. 92, 885 S.W.2d 906 (1994).

Where defendant's hands were on the steering wheel of a parked vehicle with the motor running and the lights on, defendant was in actual physical control of a vehicle. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

Evidence held sufficient to establish that defendant was in actual physical control of a motor vehicle where defendant was in the driver's side of a parked car with its engine running; the evidence was sufficient to permit the fact-finder to infer that the defendant had driven the car shortly before her arrest. *Beckner v. State*, 49 Ark. App. 56, 896 S.W.2d 445 (1995).

Evidence that defendant either operated or was in actual physical control of a vehicle held sufficient where defendant



was discovered by police walking away from a one-vehicle accident involving his own truck for which he possessed the keys in his pocket, and there was testimony that defendant had been driving his truck not long before his encounter with the police. *Springston v. State*, 61 Ark. App. 36, 962 S.W.2d 836 (1998).

Defendant was in actual physical control of a vehicle where an officer found the defendant on the driver's side of the running vehicle and slumped over in the seat apparently unconscious, notwithstanding the defendant's assertion that he had a designated driver and went out to warm up the vehicle because it was cold. *Diehl v. State*, 63 Ark. App. 190, 975 S.W.2d 878 (1998).

A defendant was not in actual physical control of a vehicle where an officer found the defendant asleep, intoxicated, and sitting behind the steering wheel, with the driver's side window rolled down, the motor and the car lights off, and the keys to the vehicle on the dashboard. *Stephenson v. City of Fort Smith*, 71 Ark. App. 190, 36 S.W.3d 754 (2000).

Where evidence showed that, at the time officers encountered defendant in his vehicle, defendant had been drinking, his foot was on the brake pedal, but the keys were not in the ignition as defendant turned off the engine by use of the remote-start button, the state failed to prove that defendant was in "actual physical control" of the vehicle and his conviction for driving while intoxicated was reversed. *Rogers v. State*, 94 Ark. App. 47, 224 S.W.3d 564 (2006).

Court rejected defendant's claim that the trial court erred in denying defendant's motion for a directed verdict in her driving while intoxicated case; direct eyewitness testimony and circumstantial evidence proved that defendant was the driver, and given that an officer saw the brake light flash on defendant's car before she exited from the driver's side with the keys in her hand, this constituted substantial evidence to establish that defendant was the driver. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

While a police officer did not see defendant driving, when the officer arrived at the scene of a reckless-driver call, defendant was slumped over the steering wheel, the motor was running, and a strong odor of alcohol was coming from

defendant; thus, the evidence was sufficient to find defendant guilty of driving while intoxicated under this section. *Cooley v. State*, 2011 Ark. App. 175 (2011).

State presented sufficient evidence that DWI defendant drove his motorcycle on the morning of the divorce proceeding, as he testified to doing so, plus a recording showed defendant admitting to an officer that he drove his motorcycle that day, and the officer testified that the motorcycle felt warm when he felt it that day. *Reep v. State*, 2015 Ark. App. 662, 476 S.W.3d 210 (2015).

### **Place of Operation.**

One may be convicted of DWI while operating a vehicle on a private roadway. *Sanders v. State*, 312 Ark. 11, 846 S.W.2d 651 (1993).

This section contains no location or geographic element, and one cannot read it to add as an element of DWI that the accused have operated or had control of a vehicle on a public highway. *Sanders v. State*, 312 Ark. 11, 846 S.W.2d 651 (1993).

The offense of DWI can be committed on the parking lot of a private club. *Hill v. State*, 315 Ark. 297, 868 S.W.2d 44 (1993).

### **Portable Breath Test.**

Evidence of the results of a portable breath test are not admissible as substantive evidence absent proof of their reliability; therefore, the trial court did not err in refusing to allow defendant to admit the results into evidence in a driving while intoxicated case. *Elser v. State*, 353 Ark. 143, 114 S.W.3d 168 (2003).

Court did not err by denying the motion to suppress; officer had reasonable suspicion that defendant was driving while intoxicated before he administered the PBT because defendant admitted he had been drinking, the officer saw defendant driving, and the officer noticed that defendant smelled of intoxicants; there was probable cause to arrest even without consideration of the PBT results because defendant told the officer that he had been drinking, his eyes were bloodshot and watery, and he smelled of intoxicants and failed two field-sobriety tests. *Fisher v. State*, 2013 Ark. App. 301, 427 S.W.3d 743 (2013).

### **Probable Cause.**

Defendant's arrest was supported by probable cause that he was driving under



the influence in violation of this section, based upon the odor of intoxicants and the performance on the field sobriety test, and a search incident to defendant's arrest was reasonable. In light of reports from citizen-informants, an officer reasonably approached defendant's car to investigate whether defendant was about to drive while intoxicated. *Stewart v. State*, 2010 Ark. App. 9, 373 S.W.3d 387 (2010).

Even if the stop started when the officer knocked on appellant's window, the officer had reasonable suspicion that appellant was endangering other officers on the street, and the officer had authority to require appellant to stop; when the odor of alcohol became apparent, the officer had reasonable suspicion to ask appellant to get out of the vehicle, and as there was probable cause to arrest him for driving while intoxicated, the trial court did not err in denying appellant's motion to suppress. *Ward v. State*, 2012 Ark. App. 649 (2012).

Trial court believed an officer's testimony that the encounter was no more than the officer trying to direct traffic and appellant's vehicle on a congested and dark street amidst a crime scene where officers' safety was at issue, and while protecting the officers was a specific explanation for knocking on appellant's window, the odor of intoxicants and his appearance gave the required suspicion for an investigation into a potential driving while intoxicated offense; under Ark. R. Crim. P. 3.1 the officer then had a duty to investigate further because it is unlawful for any person who is intoxicated to operate or be in actual physical contact of a motor vehicle. *Ward v. State*, 2012 Ark. App. 649 (2012).

### **Prohibited Conduct.**

Under subsection (b) (see now (a)(2)), intoxication is not an element of the offense; driving with a blood alcohol content of .10% or more is the prohibited act; stated differently, it is a violation per se to drive with a blood alcohol content of .10% or more. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

### **Right to Counsel.**

Because trial court had discretion in sentencing defendant to jail for first offense DWI, he was not accused or convicted of a "serious crime," and his right to

counsel did not attach at the trial level. *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990).

First offense DWI is not a serious crime by which failure to perfect an appeal would permit a claim of ineffective assistance of counsel to prevail, and failure of defendant's counsel to perfect his appeal is not a denial of his right to effective assistance of counsel. *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990).

Notwithstanding Ark. R. Crim. P. 4.5, the Court of Appeals of Arkansas held that defendant had no right to consult with counsel before taking a breathalyzer test following a traffic stop that led to his arrest and conviction for driving while intoxicated in violation of this section. *Lewis v. State*, 2013 Ark. App. 39 (2013).

### **Separate Offenses.**

The two subsections of this section do not state two separate offenses that require different elements of proof; the penalty is the same whether the section is violated by conduct proscribed by either subsection, and thus the two conditions are simply two different ways of proving a single violation. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

If the state proceeded against defendant first on driving while intoxicated (DWI) and he were acquitted, the state would be collaterally estopped from proceeding against him in a second trial for negligent homicide; however, the same result does not apply when the two offenses are tried simultaneously. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Defendant's manner of driving, which included speeding and driving left of center, violated city's hazardous driving ordinance, while defendant's act of driving his vehicle while being intoxicated violated this section; it is clear that these offenses are two separate offenses for the purpose of double jeopardy analysis since each statutory provision requires proof of a fact which the other does not. *Beasley v. State*, 47 Ark. App. 92, 885 S.W.2d 906 (1994).

**Cited:** *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984); *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984); *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985); *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985); *Peters v. State*, 286

Ark. 421, 692 S.W.2d 243 (1985); Van Patten v. State, 16 Ark. App. 83, 697 S.W.2d 919 (1985); Dacus v. State, 16 Ark. App. 222, 699 S.W.2d 417 (1985); Hoover v. Thompson, 787 F.2d 449 (8th Cir. 1986); Gullett v. State, 18 Ark. App. 97, 711 S.W.2d 836 (1986); Rogers v. State, 293 Ark. 414, 738 S.W.2d 412 (1987); Stephens v. State, 295 Ark. 541, 750 S.W.2d 52 (1988); See v. State, 296 Ark. 498, 757 S.W.2d 947 (1988); Blakemore v. State, 25

Ark. App. 335, 758 S.W.2d 425 (1988); Phillips v. State, 304 Ark. 656, 803 S.W.2d 926 (1991); Smith v. State, 55 Ark. App. 97, 931 S.W.2d 792 (1996); Johnson v. State, 55 Ark. App. 117, 932 S.W.2d 347 (1996); Byrd v. State, 326 Ark. 10, 929 S.W.2d 151 (1996); Wright v. State, 327 Ark. 558, 940 S.W.2d 432 (1997); State v. Aud, 351 Ark. 531, 95 S.W.3d 786 (2003); Tiller v. State, 2014 Ark. App. 431, 439 S.W.3d 705 (2014).

**5-65-104. Seizure, suspension, and revocation of license — Temporary permits — Ignition interlock restricted license.**

(a)(1) At the time of arrest for operating or being in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood, as provided in § 5-65-103, the arrested person shall immediately surrender his or her driver's license, driver's permit, or other evidence of driving privilege to the arresting law enforcement officer as provided in § 5-65-402.

(2) The Office of Driver Services or its designated official shall suspend or revoke the driving privilege of an arrested person or shall suspend any nonresident driving privilege of an arrested person, as provided in § 5-65-402. The suspension or revocation shall be based on the number of previous offenses as follows:

(A) Suspension for:

(i)(a) Six (6) months for the first offense of operating or being in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated or while there was an alcohol concentration of at least eight hundredths (0.08) by weight of alcohol in the person's blood or breath, § 5-65-103.

(b) If the Office of Driver Services allows the issuance of an ignition interlock restricted license under § 5-65-118, the ignition interlock restricted license shall be available immediately.

(c) The restricted driving permit under § 5-65-120 is not allowed for a suspension under this subdivision (a)(2)(A)(i); and

(ii)(a) Suspension for six (6) months for the first offense of operating or being in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance.

(b) The ignition interlock restricted license provision of § 5-65-118 does not apply to a suspension under subdivision (a)(2)(A)(ii)(a) of this section;

(B)(i) Suspension for twenty-four (24) months for a second offense of operating or being in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by



weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(ii) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the restricted license is available immediately.

(iii) The ignition interlock restricted license provision of § 5-65-118 does not apply to the suspension under subdivisions (a)(2)(B)(i) and (ii) of this section if the person is arrested for an offense of operating or being in actual physical control of a motor vehicle or motorboat while intoxicated by the ingestion of or by the use of a controlled substance;

(C)(i) Suspension for thirty (30) months for the third offense of operating or being in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(ii) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the restricted license is available immediately.

(iii) The ignition interlock restricted license provision of § 5-65-118 does not apply to the suspension under subdivisions (a)(2)(C)(i) and (ii) if the person is arrested for an offense of operating or being in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance; and

(D) Revocation for four (4) years, during which no restricted permits may be issued, for the fourth or subsequent offense of operating or being in actual physical control of a motor vehicle or motorboat while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(3) If a person is a resident who is convicted of driving without a license or permit to operate a motor vehicle or motorboat and the underlying basis for the suspension, revocation, or restriction of the license or permit was for a violation of § 5-65-103, in addition to any other penalties provided for under law, the court may restrict the offender to an ignition interlock restricted license for a period of one (1) year prior to the reinstatement or reissuance of a license or permit after the person would otherwise be eligible for reinstatement or reissuance of the person's license or permit.

(4) In order to determine the number of previous offenses to consider when suspending or revoking the arrested person's driving privilege, the office shall consider as a previous offense any of the following that occurred within the five (5) years immediately before the current offense:

(A) A conviction for an offense of operating or being in actual physical control of a motorboat on the waters of this state or a motor



vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood, including a violation of § 5-10-105(a)(1)(A) or § 5-10-105(a)(1)(B), that occurred:

- (i) In Arkansas; or
- (ii) In another state; or

(B) A suspension or revocation of driving privilege for an arrest for operating or being in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood under § 5-65-103 when the person was not subsequently acquitted of the criminal charges.

(b)(1)(A) A person whose driving privilege is suspended or revoked under this section is required to complete an alcohol education program or an alcohol treatment program as approved by the Division of Behavioral Health Services unless the charges are dismissed or the person is acquitted of the charges upon which the suspension or revocation is based.

(B) If during the period of suspension or revocation under subdivision (b)(1)(A) of this section the person commits an additional violation of § 5-65-103, he or she is also required to complete an approved alcohol education program or alcohol treatment program for each additional violation, unless:

- (i) The additional charges are dismissed; or
- (ii) He or she is acquitted of the additional charges.

(2) A person whose driving privilege is suspended or revoked under this section shall furnish proof of:

(A) Attendance at and completion of the alcohol education program or the alcohol treatment program required under subdivision (b)(1) of this section before reinstatement of his or her suspended or revoked driving privilege; or

(B) Dismissal or acquittal of the charge on which the suspension or revocation is based.

(3) Even if a person has filed a de novo petition for review under former subsection (c) of this section, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

**History.** Acts 1983, No. 549, § 13; 1985, No. 113, § 1; 1985, No. 1064, § 1; A.S.A. 1947, § 75-2511; Acts 1989, No. 368, § 1; 1989, No. 621, § 1; 1993, No. 736, § 1; 1995, No. 802, § 1; 1997, No. 830, § 1; 1997, No. 1325, § 2; 1999, No. 1077, § 9; 1999, No. 1468, § 1; 1999, No. 1508, § 7; 2001, No. 561, §§ 3-5; No. 1501, § 1; 2003, No. 541, § 1; 2003, No. 1036, § 1; 2003, No. 1462, § 1; 2003, No. 1779, § 1; 2005, No. 1234, § 3; 2005, No. 1768, § 1; 2007, No. 712, § 1; 2007, No. 827, § 75; 2007, No. 1196, § 1; 2009, No. 359, §§ 1-3; 2009, No. 650, § 2; 2009, No. 922, § 1; 2009, No. 1293, § 1; 2013, No. 479, §§ 1, 2; 2015, No. 299, § 6.

**A.C.R.C. Notes.** Acts 2007, No. 827, § 75 provided: "Acts 1999, No. 1077, § 9, is repealed due to a conflict between that act and Acts 1999, No. 1468, § 1, and Acts 1999, No. 1508, § 7, in amending § 5-65-104, and which conflict under § 1-2-207 is

resolved in favor of Acts 1999, Nos. 1468 and 1508.”

**Publisher’s Notes.** Acts 1995, No. 802, § 5(a), is also codified, in part, as §§ 5-65-120(c) and 5-65-205(c).

**Amendments.** The 2013 amendment rewrote (a)(2)(B)(ii) and (a)(2)(C)(ii); and, in (a)(3), substituted “court” for “office” and deleted “only” preceding “an ignition”.

The 2015 amendment inserted “motorboat on the waters of this state or a” and “or motorboat” throughout the section; inserted “driver’s” preceding “license” and

preceding “permit” in (a)(1); inserted the second and fourth occurrences of “or permit” in (a)(3); deleted (a)(4)(C); in (b)(1)(A), substituted “driving privilege” for “license” and “Division of Behavioral Health Services” for “Office of Alcohol and Drug Abuse Prevention”; rewrote (b)(2); and made stylistic changes.

**Cross References.** Effect of administrative revocation on motor vehicle insurance, § 27-22-106.

Administrative driver’s license suspension, § 5-65-401 et seq.

RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Criminal Law, 8 U. Ark. Little Rock L.J. 559.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Driving While Intoxicated, 26 U. Ark. Little Rock L. Rev. 367.

CASE NOTES

ANALYSIS

- Constitutionality.
- In General.
- Construction.
- Burden of Proof.
- Jurisdiction.
- Purpose.
- Prior Convictions.
- Sentence.
- Temporary Permit.

Constitutionality.

Sections 5-65-107, 5-65-109, and this section do not violate the doctrines of prosecutorial discretion and separation of powers. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985) (decision prior to 1989 amendment).

This section does not violate the constitutional prohibition on double jeopardy; this section does not impose multiple punishments for the same offense. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

Administrative suspension of a license for 180 days did not rise to the level of punishment because the suspension was that of a privilege, not a right, to operate a motor vehicle; and the Double Jeopardy Clause was not violated by a subsequent conviction on criminal charges. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

The temporary revocation of the privilege of driving for refusal to submit to a chemical analysis is rationally related to the purpose of this section, which is to protect the public from intoxicated drivers and to reduce alcohol-related accidents. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

In General.

This section does not take the power of license suspension from the jury; rather, it only directs the court to perform certain acts in executing the sentence. *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Construction.

Although defendant was charged with DWI second offense but convicted instead of DWI first offense, the defendant was not acquitted of the “charge” of DWI second offense; once the municipal court convicted defendant of DWI first offense, he simply had two separate convictions of violating § 5-65-103, since DWI first offense is just as much a violation of § 5-65-103 as is DWI second offense. *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

Burden of Proof.

The standard for administrative license suspension is based on the civil standard

of proof by a preponderance of the evidence, a lower standard than that required for a criminal conviction. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

### **Jurisdiction.**

The court had authority to suspend the driver's license of defendant convicted of driving while intoxicated and speeding, notwithstanding the contention that only the Department of Finance and Administration can suspend a license for driving while intoxicated, since the court still had authority, pursuant to § 27-50-306, to suspend the defendant's driver's license for moving traffic violations. *Cook v. State*, 333 Ark. 22, 968 S.W.2d 589 (1998).

### **Purpose.**

The purpose for the sanctions is to prevent drunk driving, and it is clear that the legislative intent was to provide remedial civil sanctions. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

The legislature intended to establish a remedial civil sanction for the purpose of protecting the public from intoxicated drivers and to reduce alcohol-related accidents while softening the sanctions in order to allow the person to continue to operate a vehicle for appropriate purposes. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

### **Prior Convictions.**

Trial court properly granted defendant's pretrial motion to suppress evidence of his three prior driving while intoxicated convictions because in those earlier proceedings he was not represented by counsel. *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984).

The legislative intent of the Omnibus DWI Act of 1983, as stated in former § 5-65-101(b), was to enhance penalties by using convictions under the older driving while under the influence act; thus, previous convictions for driving while under the influence under the prior law of intoxicants may be used as prior offenses for enhancement purposes. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Where certificates of prior convictions did not reflect that the defendants were represented by counsel at prior trials, admission of the documents held to be error. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

A prior conviction cannot be used collaterally to impose enhanced punishment, unless the misdemeanor was represented by counsel or validly waived counsel. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985).

If the record of one of three prior driving while intoxicated convictions is silent as to representation or waiver of counsel, the conviction cannot be used as evidence that the offense charged is a second or subsequent DWI offense. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Evidence that the defendant was assisted by counsel at the trial of his prior DWI conviction was held insufficient, and therefore, because there was not sufficient evidence of representation, the defendant's third conviction could not be used as evidence that the present conviction was his fourth. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Two separate convictions of DWI first offense, both violations of § 5-65-103, should be counted as two "previous offenses." *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

### **Sentence.**

The sentencing provisions of the Omnibus DWI Act of 1983 are mandatory; where imprisonment is required, such a sentence cannot be reduced or suspended by the judge. *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984).

The legislature enacted § 5-65-120 to allow those with no alternate means of commuting to and from work to apply for a restricted driving permit; this section rebuts any argument concerning the punitive effect of the sanction upon a person whose license has been suspended, as a result of which his ability to maintain his means of livelihood is impaired. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

Second-offense sanctions could be imposed on defendant with two convictions for DWI first offense. *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

### **Temporary Permit.**

This section clearly provides for a temporary permit to be issued upon arrest, which remains valid until the trial, but, after a guilty plea or conviction of a first offender, the temporary permit does not continue indefinitely until the first of-



fender receives notice of the right to apply for a restricted license. *Liggett v. State*, 309 Ark. 608, 832 S.W.2d 813 (1992).

**Cited:** *Rawlings v. State*, 284 Ark. 446, 683 S.W.2d 223 (1985); *Urich v. State*, 293

Ark. 246, 737 S.W.2d 155 (1987); *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *Gorman v. State*, 366 Ark. 82, 233 S.W.3d 622 (2006).

### 5-65-105. Operation of motor vehicle during period of license suspension or revocation.

A person whose driving privilege has been suspended or revoked under this subchapter who operates a motor vehicle in this state during the period of the suspension or revocation upon conviction is guilty of an unclassified misdemeanor and:

(1) Shall be imprisoned for not less than ten (10) days or more than ninety (90) days; and

(2) May be assessed a fine of not more than one thousand dollars (\$1,000).

**History.** Acts 1983, No. 549, § 14; A.S.A. 1947, § 75-2512; Acts 2001, No. 1715, § 1; 2015, No. 299, § 6; 2015, No. 1035, § 1.

**A.C.R.C. Notes.** Pursuant to § 1-2-207, the amendments to this section by Acts 2015, No. 299, § 6, are partially superseded by the amendments to this section by Acts 2015, No. 1035, § 1. Acts 2015, No. 299, § 6, changed the word “act” to “chapter”.

**Amendments.** The 2015 amendment by No. 299 inserted the (1) and (2) designations; and in the introductory language,

substituted “A person” for “Any person”, “driving privilege” for “privilege to operate a motor vehicle”, and “this chapter” for “a provision of this act” and added “upon conviction is guilty of an unclassified misdemeanor and”.

The 2015 amendment by No. 1035 substituted “A person” for “any person”, substituted “this subchapter” for “a provision of this act”, inserted “upon conviction is guilty of an unclassified misdemeanor and”, and substituted “not less than ten (10) days or more than ninety (90) days” for “ten (10) days”.

### CASE NOTES

#### ANALYSIS

Evidence.  
Sentencing.

#### Evidence.

Trial court did not err in denying defendant’s motion to suppress the statement he made to an officer who stopped him admitting that he knew his license was suspended; no Miranda warning was needed because, at the time of the statement, defendant sat in his car on the side of the road, he was never arrested, and after the officer gave him the traffic citation he was free to go. *Gorman v. State*, 366 Ark. 82, 233 S.W.3d 622 (2006).

Evidence was sufficient for a conviction of driving with a suspended license where defendant admitted to the police officer who had stopped him that he knew his

license was suspended and the state produced a certified driving record at trial indicating that defendant’s license was suspended for a DWI that had occurred in December 2002. *Gorman v. State*, 366 Ark. 82, 233 S.W.3d 622 (2006).

Defendant’s convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women’s path, and (4) defendant drove away after the impact. *Estacuy v. State*, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Evidence was substantial to support a conviction for driving on a suspended license under this section because defen-

dant was not following the restrictions given on his restricted driving permit. The Arkansas Office of Driver Services had issued a restricted permit for defendant to drive from his home in Fayetteville to school, drug-and-alcohol education classes, and for medical emergencies. *Fiveash v. State*, 2015 Ark. App. 187, 458 S.W.3d 774 (2015).

**Sentencing.**

The sentencing provisions of the Omnibus DWI Act of 1983 are mandatory;

where imprisonment is required, such a sentence cannot be reduced or suspended by the judge. *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984).

**Cited:** *Liggett v. State*, 309 Ark. 608, 832 S.W.2d 813 (1992); *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992); *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997).

**5-65-106. Impoundment of license plate.**

(a) When a law enforcement officer arrests a person for operating a motor vehicle while that person's driving privilege has been suspended or revoked under the laws of any state due to the person's having previously been found guilty or having pleaded guilty or nolo contendere to violating § 5-65-103 and if the motor vehicle operated by the person is owned in whole or part by the person, the motor vehicle license plate shall be impounded by the law enforcement officer for no less than ninety (90) days.

(b) If the court determines it is in the best interest of the dependents of the person, the court shall instruct the Director of the Department of Finance and Administration to issue a temporary substitute motor vehicle license plate for the motor vehicle, and the temporary substitute motor vehicle license plate shall indicate that the original motor vehicle license plate has been impounded.

**History.** Acts 1983, No. 549, § 15; A.S.A. 1947, § 75-2513; Acts 2015, No. 299, § 6.

**Amendments.** The 2015 amendment, in (a), substituted "a" for "any" preceding

"law enforcement officer", "driving privilege" for "operator's license or permit", and "person's" for "person" preceding "having"; and rewrote (b).

**5-65-107. Persons arrested to be tried on charges — No charges reduced — Filing citations.**

(a) A person arrested for violating § 5-65-103 shall be tried on the charge of violating § 5-65-103 or plead to the charge of violating § 5-65-103, and the charge of violating § 5-65-103 shall not be reduced or dismissed.

(b) Furthermore, when a law enforcement officer issues a citation for violating § 5-65-103, the citation shall be filed with the court as soon as possible.

**History.** Acts 1983, No. 549, § 8; A.S.A. 1947, § 75-2508; Acts 2015, No. 299, § 6.

**Amendments.** The 2015 amendment rewrote (a).

## CASE NOTES

## ANALYSIS

Constitutionality.  
 Altering Charges.  
 Citation.  
 Reduction of Offense.

**Constitutionality.**

That part of the Omnibus DWI Act which takes away from the prosecuting attorney and the court the right to reduce a charge and accept plea bargains and places that power within the hands of the policeman who files the charge is not unconstitutional. *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

The doctrine of prosecutorial discretion and separation of powers are not violated by this section. *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985).

This section and §§ 5-65-104 and 5-65-108 do not violate the doctrines of prosecutorial discretion and separation of powers. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

It is not unconstitutional for this section to authorize a police officer, rather than the prosecuting attorney or grand jury, to file the misdemeanor charge. *Bigham v. State*, 23 Ark. App. 108, 743 S.W.2d 405 (1988).

**Altering Charges.**

Municipal court erred and prejudiced defendant charged with driving while in-

toxicated (DWI) when it changed the charge to driving under the influence (DUI) on its own motion, because DUI is not a lesser-included offense of DWI and altering the charge violated this section; and the circuit court erred in trying and convicting defendant of DUI following his appeal from the municipal court, a judgment it was not authorized to render under § 16-19-1105. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997), overruled in part, *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

**Citation.**

Where citation issued by police officer was sufficient to charge defendant with the violation, a subsequent attempt by the city attorney to duplicate that charge could not destroy the citation's effectiveness. *Bigham v. State*, 23 Ark. App. 108, 743 S.W.2d 405 (1988).

**Reduction of Offense.**

The no-reduction language of this section applies to the reduction of the offense, such as to reckless driving, not to the number of offenses. *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984).

**Cited:** *Brewer v. State*, 286 Ark. 1, 688 S.W.2d 736 (1985); *Pipes v. State*, 22 Ark. App. 235, 738 S.W.2d 423 (1987); *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000).

**5-65-108. No probation prior to adjudication of guilt.**

(a) A circuit court judge or district court judge may not utilize the first-time offender probation provisions under § 16-93-301 et seq. when the defendant is charged with violating § 5-65-103.

(b) Notwithstanding the provisions of § 5-4-301, § 5-4-322, or subsection (a) of this section, a circuit court judge or district court judge may:

(1) Utilize probationary supervision, in addition to the mandatory penalties required for a violation of § 5-65-103, solely for the purpose of monitoring compliance with his or her orders; and

(2) Require an offender to pay a reasonable fee in an amount to be established by the circuit court judge or district court judge.

**History.** Acts 1983, No. 549, § 9; A.S.A. 1947, § 75-2509; Acts 2005, No. 1768, § 2; 2007, No. 827, § 76; 2015, No. 299, § 6.

**Amendments.** The 2015 amendment rewrote the section.



## CASE NOTES

## ANALYSIS

Constitutionality.  
Mandatory Sentencing.

**Constitutionality.**

This section, §§ 5-65-104 and 5-65-107 do not violate the doctrines of prosecutorial discretion and separation of powers. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

**Mandatory Sentencing.**

The trial court was without authority to suspend the sentence of a defendant convicted of driving while intoxicated or put him on probation so he would not have to attend an alcohol treatment or education program. *Harris v. State*, 285 Ark. 345, 686 S.W.2d 440 (1985).

**Cited:** *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984).

**5-65-109. Presentencing report.**

(a) The court shall immediately request and the Division of Behavioral Health Services or its designee shall provide a presentence screening and assessment report of the defendant who pleads guilty or nolo contendere or is found guilty of violating § 5-65-103 or § 5-65-303.

(b)(1) The presentence screening and assessment report shall be provided within thirty (30) days of the request, and the court shall not pronounce sentence until the court receives the presentence screening and assessment report.

(2)(A) If the defendant's sentencing is delayed by the defendant after he or she pleads guilty or nolo contendere, or if he or she is found guilty, the clerk of the court shall notify the defendant by first-class mail sent to the defendant's last known address that he or she has fifteen (15) days to appear and show cause for failing to appear for sentencing.

(B) The court may proceed with sentencing even in the absence of the defendant after the expiration of the fifteen (15) days under subdivision (b)(2)(A) of this section.

(c) The presentence screening and assessment report shall include without limitation:

- (1) The defendant's driving record;
- (2) An alcohol problem assessment; and
- (3) A victim impact statement, if applicable.

**History.** Acts 1983, No. 549, § 6; A.S.A. 1947, § 75-2506; Acts 1991, No. 899, § 1; 1999, No. 1077, § 10; 2003, No. 129, § 1; 2007, No. 251, § 1; 2007, No. 827, § 77; 2013, No. 1107, § 3; 2015, No. 299, § 6.

**Amendments.** The 2013 amendment

substituted "Division of Behavioral Health Services" for "Office of Alcohol and Drug Abuse Prevention" in (a).

The 2015 amendment rewrote the section.

CASE NOTES

ANALYSIS

Self-Incrimination.  
Sentencing.

**Self-Incrimination.**

This section does not require a defendant to take any action whatever in response to the state's proof or to the presentence report; so there is no compulsory self-incrimination. *Janes v. State*, 285 Ark. 279, 686 S.W.2d 783 (1985); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

The presentence screening and assessment report on the defendant required by this section do not violate his right against compulsory self-incrimination. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

The mere possibility that defendant may be asked questions, the answers to which may have the effect of causing the trial court to sentence more harshly than it otherwise might, did not excuse defendant's violation of the trial court's order that he report to the agency charged with the responsibility of conducting an evaluation. *Watson v. City of Fayetteville*, 322 Ark. 324, 909 S.W.2d 637 (1995).

**Sentencing.**

The requirement that the jury fix the sentence does not render the presentence

report requirement of this section meaningless; there are situations when the report still will be of value, as when the court fixes the sentence under one of the exceptions of § 5-4-103(b). *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Subsection (b) does not require that sentencing be delayed 30 days after a finding of guilt. *Lowe v. State*, 300 Ark. 106, 776 S.W.2d 822 (1989).

The trial court committed reversible error in imposing sentence in the absence of a presentence report where (1) the defendant was convicted of driving while intoxicated, (2) after the jury deadlocked in the sentencing phase, the trial court assumed the sentencing function, and (3) the defendant was given the maximum sentence of a year in jail, a \$ 1,000 fine, and suspension of his driver's license for 120 days. *Donald v. State*, 73 Ark. App. 79, 42 S.W.3d 563 (2001).

**Cited:** *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984); *Rawlings v. State*, 284 Ark. 446, 683 S.W.2d 223 (1985); *Price v. State*, 285 Ark. 148, 685 S.W.2d 506 (1985); *Hogan v. State*, 289 Ark. 402, 712 S.W.2d 295 (1986); *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992).

**5-65-110. Record of violations and court actions — Abstract.**

(a) A court shall:

(1) Keep or cause to be kept a record of any violation of this chapter presented to that court; and

(2) Keep a record of any official action by that court in reference to the violation including without limitation:

(A) A record of every finding of guilt;

(B) A record of every plea of guilty or nolo contendere;

(C) A judgment of acquittal; and

(D) The amount of fine and jail sentence.

(b)(1) The court or clerk of the court shall prepare and immediately forward to the Office of Driver Services an abstract of the court record pertaining to the case in which the person was found guilty or pleaded guilty or nolo contendere.

(2) The abstract shall be:

(A) Prepared within five (5) business days after the defendant was found guilty or pleaded guilty or nolo contendere and then sentenced;

(B) Certified by the person required to prepare it to be true and correct; and

(C) Made upon a form furnished by the office and shall include:

- (i) The name and address of the person charged;
- (ii) The number, if any, of the operator's or chauffeur's license of the person charged;
- (iii) The registration number of the vehicle or motorboat involved;
- (iv) The date of the hearing;
- (v) The defendant's plea;
- (vi) The judgment; and
- (vii) The amount of the fine and jail sentence.

**History.** Acts 1983, No. 549, § 10; A.S.A. 1947, § 75-2510; Acts 2015, No. 299, § 6.

**Amendments.** The 2015 amendment rewrote the section.

### CASE NOTES

#### **Admissibility.**

Where the first two documents of an exhibit were certified by the Deputy Clerk of the Municipal Court and filed with the Department of Finance and Administration as required by subsection (b) of this section, and the documents were duly certified as true and correct copies of the

records of the Office of Driver Control by the Manager of the Driver Control Section, the exhibit was admissible as a self-authenticating document pursuant to Evid. Rule 902(4). *Price v. State*, 48 Ark. App. 37, 889 S.W.2d 40 (1994).

**Cited:** *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984).

### **5-65-111. Sentencing — Periods of incarceration — Exception.**

(a)(1)(A) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103, for a first offense, is upon conviction guilty of an unclassified misdemeanor and may be imprisoned for not less than twenty-four (24) hours but no more than one (1) year.

(B) The court may order public service instead of imprisonment and, if the court orders public service, the court shall include the reasons for the order of public service instead of imprisonment in the court's written order or judgment.

(2)(A) If a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense, a person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 is upon conviction guilty of an unclassified misdemeanor and may be imprisoned for not less than seven (7) days but no more than one (1) year.

(B) The court may order public service instead of imprisonment and, if the court orders public service, the court shall include the reasons for the order of public service instead of imprisonment in the court's written order or judgment.

(b)(1) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 for a second offense occurring within five (5) years of the first offense is upon conviction guilty of an unclassified misdemeanor and may be imprisoned for not less than:



(A) Seven (7) days but no more than one (1) year; or

(B) Thirty (30) days but no more than one (1) year if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(2) The court may order public service instead of imprisonment in the following manner, and if the court orders public service, the court shall include the reasons for the order of public service instead of imprisonment in its written order or judgment:

(A) Not less than thirty (30) days; or

(B) Not less than sixty (60) days if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(c)(1) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 for a third offense occurring within five (5) years of the first offense is upon conviction guilty of an unclassified misdemeanor and may be imprisoned for not less than:

(A) Ninety (90) days but no more than one (1) year; or

(B) One hundred twenty (120) days but no more than one (1) year if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(2) The court may order public service instead of imprisonment in the following manner, and if the court orders public service, the court shall include the reasons for the order of public service instead of imprisonment in its written order or judgment:

(A) Not less than ninety (90) days; or

(B) Not less than one hundred twenty (120) days if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(d)(1) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 for a fourth offense occurring within five (5) years of the first offense is upon conviction guilty of an unclassified felony and may be imprisoned for not less than:

(A) One (1) year but no more than six (6) years; or

(B) Two (2) years but no more than six (6) years if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(2) The court may order public service instead of imprisonment in the following manner, and if the court orders public service, the court shall include the reasons for the order of public service instead of imprisonment in its written order or judgment:

(A) Not less than one (1) year but no more than six (6) years; or

(B) Not less than two (2) years but no more than six (6) years if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(e)(1) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 for a fifth or subsequent offense occurring within five (5) years of the first offense is upon conviction guilty of an unclassified felony and may be imprisoned for no fewer than:

(A) Two (2) years but no more than ten (10) years; or

(B) Three (3) years but no more than ten (10) years if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(2) The court may order public service instead of imprisonment in the following manner, and if the court orders public service, the court shall include the reasons for the order of public service instead of imprisonment in its written order or judgment:

(A) Not less than two (2) years but no more than ten (10) years; or

(B) Not less than three (3) years but no more than ten (10) years if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(f)(1) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 for a sixth or subsequent offense occurring within ten (10) years of the first offense is upon conviction guilty of a Class B felony.

(2) The court may order public service instead of imprisonment in the following manner, and if the court orders public service, the court shall include the reasons for the order of public service instead of imprisonment in its written order or judgment:

(A) Not less than two (2) years but no more than ten (10) years; or

(B) Not less than three (3) years but no more than ten (10) years if a passenger under sixteen (16) years of age was in the motor vehicle or motorboat at the time of the offense.

(g) A certified judgment of conviction of driving or boating while intoxicated or other equivalent offense from another state or jurisdiction may be used to enhance the penalties as a previous offense under this section.

(h) For any arrest or offense occurring before July 22, 2015, but that has not reached a final disposition as to judgment in court, the offense shall be decided under the law in effect at the time the offense occurred, and the defendant is subject to the penalty provisions in effect at that time and not under the provisions of this section.

(i) It is an affirmative defense to prosecution under subdivisions (a)(2)(A), (b)(1)(B), (c)(1)(B), (d)(1)(B), and (e)(1)(B) of this section that the person operating or in actual physical control of the motor vehicle or motorboat was not more than two (2) years older than the passenger.

(j)(1) A prior conviction for § 5-10-105(a)(1)(A) or § 5-10-105(a)(1)(B) is considered a previous offense for purposes of this section.

(2) A prior conviction under former § 5-76-102 is considered a previous offense for purposes of this section only if the current offense is operating a motorboat on the waters of this state while intoxicated.

**History.** Acts 1983, No. 549, § 4; A.S.A. 1947, § 75-2504; Acts 1997, No. 1236, § 1; 1999, No. 1077, § 11; 2001, No. 1206, § 1; 2003, No. 1461, §§ 1, 2; 2009, No. 650, § 3; 2013, No. 1268, § 1; 2015, No. 299, § 6.

**Amendments.** The 2013 amendment in (4)(A)(i) substituted "Except as provided in § 5-65-122, for" for "For" and substituted "an unclassified" for "a" preceding "felony".

The 2015 amendment rewrote the section.

RESEARCH REFERENCES

**Ark. L. Rev.** Notes, *Shockley v. State: The Constitutionality of the Arkansas Habitual Offender Determination Procedure*, 39 Ark. L. Rev. 553.

**U. Ark. Little Rock L.J.** Survey — Criminal Law, 11 U. Ark. Little Rock L.J. 175.

Seventeenth Annual Survey of Arkansas Law — Criminal Law, 17 U. Ark. Little Rock L.J. 448.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Driving While Intoxicated, 26 U. Ark. Little Rock L. Rev. 367.

CASE NOTES

ANALYSIS

- Constitutionality.
- Construction.
- Applicability of Other Provisions.
- Arrest.
- Assistance of Counsel.
- Bifurcation of Trial.
- First Offense.
- Indictment or Information.
- Prior Convictions.
- Sentencing.

Constitutionality.

The application of this section to the defendant did not violate the prohibition against ex post facto laws, notwithstanding that the pre-1999 version of the statute only allowed the state to rely on prior DWI convictions from the last three, rather than five, years; the application of this section did not improperly allow the state to consider prior convictions that were more than three years old, as the defendant had notice, by the amendment of the statute, that any future offense would subject him to increased penalties based on convictions in the previous five years. *Berry v. State*, 74 Ark. App. 141, 45 S.W.3d 435 (2001).

Defendant’s conviction under former § 5-65-122 (see now this section), enhancing the sentence for a sixth offense of driving while intoxicated, did not violate the ex post facto clauses of the United States Constitution and the Arkansas Constitution, even though the prior convictions occurred before passage of the statute, because the crime with which

defendant was charged occurred after former § 5-65-122 was enacted. Defendant’s remaining claims were not preserved for appellate review. *Laymon v. State*, 2015 Ark. 485, 478 S.W.3d 203 (2015).

Construction.

The language of this section is unambiguous: the element of fourth-offense DWI is based on the number of prior offenses, not how they were designated. *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996).

Applicability of Other Provisions.

Section 5-4-502 is inapplicable to the Omnibus DWI Act because it applies only to the determination of habitual offender status pursuant to § 5-4-501; that statute provides extended terms of imprisonment for those who have committed more than one but less than four felonies. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Defendant’s sentence was not authorized under this section because the trial court should not have used the habitual offender statute, § 5-4-501, in conjunction with the DWI sentencing enhancement provision; therefore, his sentence was properly modified from 15 to 10 years’ imprisonment. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Arrest.

A private person cannot make an arrest for second offense driving while intoxicated. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).



**Assistance of Counsel.**

If the record is silent as to representation of the defendant or waiver of the right to counsel, the conviction cannot be used as evidence that the offense charged is the fourth driving while intoxicated offense, and thus a felony under this section. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

Where the state introduced into evidence duly certified copies of documents purporting to evidence three prior convictions for the offense of driving while intoxicated and two of the documents contained the entry "Trial Docket," and immediately beneath appeared the name of an attorney, and clerk of the court in which the convictions were obtained testified as to the manner in which such docket entries were made and that appearance of attorney's name meant that he had represented defendant and that, had defendant not been represented by an attorney, the word "none" would have appeared on the docket where attorney's name was shown, record entry was not too ambiguous to establish representation by counsel. *Rodgers v. State*, 31 Ark. App. 159, 790 S.W.2d 911 (1990).

Certified copies of court dockets introduced to prove defendant's prior convictions of DWI, on which there was a column designated "Atty:" and immediately after this designation on the first docket sheet appeared names, under *Tims v. State*, 26 Ark. App. 102, 770 S.W.2d 211, supplemental op., reh'g denied, 26 Ark. App. 106-A, 770 S.W.2d 211 (1989), because the entries could mean that the attorneys were either defense counsel or the prosecutor, in the absence of further evidence, the record was too ambiguous to determine whether defendant was represented or had validly waived counsel; therefore, defendant's conviction was reversed. *Neville v. State*, 41 Ark. App. 65, 848 S.W.2d 947 (1993).

**Bifurcation of Trial.**

A trial for driving while intoxicated as a fourth offense should be bifurcated. The jury must first hear evidence of guilt or innocence; if the defendant is found guilty of the instance of DWI alleged, the jury will then hear evidence of previous convictions. The trial judge will still determine whether the accused was represented by, or entered a valid waiver of, counsel in the

previous convictions alleged and will exclude evidence of any conviction not meeting the counsel requirement. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

**First Offense.**

Driving While Intoxicated (DWI), First Offense is a lesser included offense of DWI, Second Offense. *Hagar v. City of Fort Smith*, 317 Ark. 209, 877 S.W.2d 908 (1994).

**Indictment or Information.**

Information alleging that defendant had three prior DWI "arrests" rather than three prior DWI "convictions" held sufficient where evidence showed that defendant did in fact have three DWI convictions. *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996).

**Prior Convictions.**

Trial court properly granted defendant's pretrial motion to suppress evidence of his prior driving while intoxicated convictions, because in those earlier proceedings he was not represented by counsel. *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984).

The legislative intent of the Omnibus DWI Act of 1983, as formerly stated in § 5-65-101, was to enhance penalties by using convictions under the prior driving while under the influence act; thus, previous convictions for driving while under the influence of intoxicants under the prior law may be used as prior offenses for enhancement purposes. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

A prior conviction cannot be used collaterally to impose enhanced punishment, unless the misdemeanor was represented by counsel or validly waived counsel. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985); *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985).

Where documents did not reflect that the defendants were represented by counsel at their prior trials, admission of the documents held to be error. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The state is barred from using prior uncounseled misdemeanor convictions for driving while intoxicated to enhance punishment for a subsequent offense. *Steele v. State*, 284 Ark. 340, 681 S.W.2d 354

(1984). But see *Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997).

Evidence held insufficient to meet minimum standards of proof of prior convictions for driving while intoxicated. *Steele v. State*, 284 Ark. 340, 681 S.W.2d 354 (1984).

If a defendant did not have counsel and did not waive counsel when he was first convicted, that conviction cannot be used for enhancement, and if it is so used the error can be corrected on appeal. *Janes v. State*, 285 Ark. 279, 686 S.W.2d 783 (1985).

If the record of prior driving while intoxicated conviction is silent as to representation or waiver of counsel, the conviction cannot be used as evidence that the offense charged is the fourth DWI offense and thus a felony under this section. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

The existence of three prior convictions constitutes an element of DWI, fourth offense, and thus the trial court deprived the defendant of his right to have the jury determine a material element of the offense charged where after the jury returned a guilty verdict, the judge heard evidence in chambers to determine the number of prior convictions, and then instructed the jury that the range of sentences should be based on three prior convictions. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Evidence that the defendant was assisted by counsel at the trial of previous DWI conviction held insufficient. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Where the municipal judge, in his own handwriting, noted that the defendant's rights had been explained and waived in a previous prosecution for driving while intoxicated, the trial court properly considered the prior conviction in setting sentence. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

The General Assembly did not intend to allow a defense attorney to reduce an enhanced penalty for third offense driving while intoxicated to a second offense merely by obtaining continuances so that the last conviction would fall outside the three-year period; similarly, it did not intend that delay due to court congestion might reduce the degree and penalty. Accordingly, the dates the defendant's prior

offenses were committed are the determinative dates for determining the applicability of enhanced punishment. *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987).

Where state did not show that all three of the defendant's prior violations occurred within three years of the first violation; but instead, only showed that all three convictions occurred within three years, the case was reversed and remanded. *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987).

Where the record showed that the defendant waived the right to counsel at the time he pleaded guilty to the DWI charge in the municipal court, the record did not have to also show that the judge advised defendant as to the consequences of a subsequent conviction for the same charge before the conviction could be introduced into evidence in the subsequent case. And although the conviction was marked "D.W.I. 2nd Offense," that was not significant where it was, in fact, the defendant's third DWI conviction within three years and defendant knew how many times he had been convicted of that offense. *Dickerson v. State*, 24 Ark. App. 36, 747 S.W.2d 122 (1988).

The offense of driving while intoxicated is less than a felony, unless one is found guilty of a fourth or subsequent offense occurring within three years of the first one. *Credit v. State*, 25 Ark. App. 309, 758 S.W.2d 10 (1988).

The fact of prior convictions is an element of the crime of driving while intoxicated, fourth offense, and is to be determined by the jury. *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989).

In the context of a driving while intoxicated (DWI) conviction, the judgment of the district court stands until overturned by a superior court and is a valid DWI offense to be used under subdivision (b)(3) of this section; thus, defendant's judgment of DWI in the district court could be counted as one of four DWI convictions in support of enhanced penalties for multiple DWI offenses. *Swint v. State*, 356 Ark. 361, 152 S.W.3d 226 (2004).

In defendant's bench trial for felony fourth offense driving while intoxicated (DWI), a trial court did not abuse its discretion in allowing the state to reopen its case for the purpose of introducing the omitted proof of defendant's prior DWI



convictions because defendant's motion for a directed verdict came at the conclusion of her case, not at the conclusion of the state's evidence and defendant was neither surprised nor disadvantaged by the trial court's use of a bifurcated procedure. *Henry v. State*, 2011 Ark. App. 169, 378 S.W.3d 832 (2011).

### **Sentencing.**

Where the defendants were convicted of violating the Omnibus DWI Act of 1983, the trial court did not have the authority to suspend their sentences, since the sentencing provisions of the act are mandatory. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The sentencing provisions of the Omnibus DWI Act of 1983 are mandatory; where imprisonment is required, such a sentence cannot be reduced or suspended by the judge. *Lovell v. State*, 283 Ark. 434, 681 S.W.2d 395 (1984).

The legislature did not intend that this section, the specific criminal enhancement statute for driving while intoxicated, should be coupled with the general criminal enhancement statute, § 5-4-501, for the resulting purpose of creating a greater sentence than if either statute had been applied singly. *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (1988).

This statute does not confer upon the trial court authority to instruct the jury on public service as an alternative sentence, rather, the court may order public service in lieu of jail, presumably as part of sentencing following a bench trial, or in the nature of post-conviction relief. *McEn-*

*tire v. State*, 305 Ark. 470, 808 S.W.2d 762 (1991).

Original judgment and commitment order for driving while intoxicated, fourth offense, was illegal because the two-year imprisonment followed by a five-year term of probation exceeded the maximum penalty for the offense committed as defined under this section and because the imposition of probation following a term of imprisonment is prohibited by § 5-4-104. *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1996).

Critical point for counting driving while intoxicated (DWI) offenses is at the sentencing phase, not the date that the crime is committed, and this section plainly contemplates determining total DWI offenses within five years of the first offense and, to the extent Ark. Model Jury Instruction Crim. § 2d 9201.4 is in conflict with this method of counting prior offenses, this section prevails. *State v. Sola*, 354 Ark. 76, 118 S.W.3d 95 (2003).

**Cited:** *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984); *Municipal Court v. Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987); *Tims v. State*, 26 Ark. App. 102, 770 S.W.2d 211 (1989); *Deweese v. State*, 26 Ark. App. 126, 761 S.W.2d 945 (1988); *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990); *Lukehart v. State*, 32 Ark. App. 152, 798 S.W.2d 117 (1990); *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *State v. Roberts*, 321 Ark. 31, 900 S.W.2d 175 (1995); *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997); *Wray v. State*, 64 Ark. App. 166, 984 S.W.2d 45 (1998); *Szabo v. State*, 2015 Ark. App. 512, 470 S.W.3d 696 (2015).

### **5-65-112. Fines.**

A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 shall be fined:

- (1) No less than one hundred fifty dollars (\$150) and no more than one thousand dollars (\$1,000) for the first offense;
- (2) No less than four hundred dollars (\$400) and no more than three thousand dollars (\$3,000) for the second offense occurring within five (5) years of the first offense; and
- (3) No less than nine hundred dollars (\$900) and no more than five thousand dollars (\$5,000) for the third or subsequent offense occurring within five (5) years of the first offense.

**History.** Acts 1983, No. 549, § 5; A.S.A. 1999, No. 1077, § 12; 2013, No. 1268, § 2; 1947, § 75-2505; Acts 1993, No. 106, § 1; 2015, No. 299, § 6.



**Amendments.** The 2013 amendment substituted “Except as provided in § 5-65-122, no” for “No” at the beginning of (3).

The 2015 amendment substituted “A” for “Any” in the introductory language

and deleted “Except as provided in § 5-65-122” at the beginning of (3).

CASE NOTES

ANALYSIS

Applicability.  
Prior Convictions.

**Applicability.**

Where the defendants were convicted of violating the Omnibus DWI Act of 1983, the trial court did not have the authority to suspend their sentences, since the sentencing provisions of the act are mandatory. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

**Prior Convictions.**

Prior convictions may not be considered for purposes of the sentencing enhancement for subsequent convictions for driv-

ing while intoxicated unless the record shows the accused had counsel in the trials leading to the prior convictions or that the right to counsel was waived. *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985).

If a defendant did not have counsel and did not waive counsel when he was first convicted, that conviction cannot be used for enhancement, and if it is so used the error can be corrected on appeal. *Janes v. State*, 285 Ark. 279, 686 S.W.2d 783 (1985).

**Cited:** *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996); *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997).

5-65-113. [Repealed.]

**Publisher’s Notes.** This section, concerning additional court costs, was repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995 (1st Ex. Sess.), No.

13, § 4. The section was derived from Acts 1983, No. 918, §§ 1, 3; A.S.A. 1947, §§ 75-2531, 75-2532.

5-65-114. Inability to pay — Alternative public service work.

If a court finds that a person against whom fines, fees, or court costs are levied for violating this chapter is financially unable to pay the fines, fees, or costs, the court shall order the person to perform public service work as the court determines is appropriate.

**History.** Acts 1983, No. 918, § 4; A.S.A. 1947, § 75-2533; Acts 2015, No. 299, § 6.

**Amendments.** The 2015 amendment rewrote the section.

5-65-115. Alcohol treatment or education program — Fee.

(a)(1) A person whose driving privileges are suspended or revoked for violating § 5-65-103, § 5-65-303, § 5-65-310, or § 3-3-203 is required to complete an alcohol education program provided by a contractor with the Division of Behavioral Health Services or an alcoholism treatment program licensed by the division.

(2)(A) The alcohol education program may collect a program fee of up to one hundred twenty-five dollars (\$125) per enrollee to offset program costs.

(B)(i) A person ordered to complete an alcohol education program under this section may be required to pay, in addition to the costs collected for education or treatment, a fee of up to twenty-five dollars (\$25.00) to offset the additional costs associated with reporting requirements under this subchapter.

(ii) The alcohol education program shall report monthly to the division all revenue derived from this fee.

(b)(1) A person whose driving privilege is suspended or revoked for violating § 5-65-103 shall:

(A) Both:

(i) Furnish proof of attendance at and completion of the alcoholism treatment program or alcohol education program required under § 5-65-104(b)(1) before reinstatement of his or her suspended or revoked driving privilege; and

(ii) Pay any fee for reinstatement required under § 5-65-119 or § 5-65-304; or

(B) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(2) An application for reinstatement shall be made to the Office of Driver Services.

(c) Even if a person has filed a de novo petition for review under § 5-65-402, he or she is entitled to reinstatement of driving privileges upon complying with this section and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(d)(1) A person whose driving privilege has been suspended or revoked under this chapter may enroll in an alcohol education program prior to disposition of the case by the circuit court or district court.

(2) However, the person is not entitled to a refund of a fee paid if the charges are dismissed or if the person is acquitted.

(e) An alcohol education program or alcoholism treatment program operating under this chapter shall remit the fees imposed under this section to the division.

**History.** Acts 1983, No. 549, § 7; 1985, No. 108, § 1; A.S.A. 1947, § 75-2507; Acts 1991, No. 486, § 1; 1995, No. 172, § 1; 1995, No. 263, § 1; 1995, No. 1032, § 1; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1999, No. 1077, § 13; 2003, No. 1462, § 2; 2005, No. 1768, § 3; 2007, No. 251, § 2; 2007, No. 827, § 78; 2009, No. 748, § 28; 2013, No. 1107, §§ 4, 5; 2015, No. 299, § 6.

**A.C.R.C. Notes.** Acts 2007, No. 827, § 78 provided: “Acts 1995, No. 172, § 1, and Acts 1995, No. 1032, § 1, are repealed due to a conflict between those acts and Acts 1995, No. 263, § 1, and Acts 1995, No. 1256, § 20, in amending § 5-65-115, and which conflict under § 1-2-207 is resolved

in favor of Acts 1995, Nos. 263 and 1256.”

**Amendments.** The 2013 amendment substituted “Division of Behavioral Health Services” for “Office of Alcohol and Drug Abuse Prevention” twice in (a)(1), once in (a)(2)(B)(ii) and (e).

The 2015 amendment substituted “driving privilege” for “license” in the introductory language of (b)(1); substituted “driving privilege” for “driver’s license” in (b)(1)(A)(i); in (d)(1), substituted “A person whose driving privilege has been suspended or revoked under this chapter” for “A person suspended under this act”, substituted “case” for “offense”, and deleted “or city court” at the end; deleted “of the charges” at the end of (d)(2); in (e), substi-

tuted “An” for “Each” and inserted “operating under this chapter”; and made stylistic changes.

### CASE NOTES

**Cited:** Phillips v. State, 304 Ark. 656, 803 S.W.2d 926 (1991); Tauber v. State, 324 Ark. 47, 919 S.W.2d 196 (1996).

### 5-65-116. [Repealed.]

**Publisher’s Notes.** This section, concerning the denial of driving privileges for a minor and restricted permits, was repealed by Acts 2015, No. 299, § 6. This

section was derived from Acts 1989 (3rd Ex. Sess.), No. 93, §§ 1, 3, 4; 1993, No. 1257, § 2.

### 5-65-117. Seizure and sale of a motor vehicle or motorboat.

(a)(1)(A) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 for a fourth or subsequent offense occurring within five (5) years of the first offense may have his or her motor vehicle or motorboat seized at the discretion of the court.

(B) A motor vehicle or motorboat seized under this section shall be the motor vehicle or motorboat that the person was operating or was in actual physical control of at the time he or she committed the fourth offense.

(C) The title to the motor vehicle or motorboat is forfeited to the state if the motor vehicle or motorboat is seized under this section.

(2)(A) It is the duty of the county sheriff of the county where the offense occurred to seize the motor vehicle or motorboat if seizure is ordered by the court.

(B) The court may issue an order directing the county sheriff to sell the seized motor vehicle or motorboat at a public auction to the highest bidder within thirty (30) days from the date of judgment.

(b)(1) The county sheriff shall advertise the motor vehicle or motorboat for sale for a period of two (2) weeks prior to the date of sale by at least one (1) insertion per week in a newspaper having a bona fide circulation in the county.

(2) The notice shall include a brief description of the motor vehicle or motorboat to be sold and the time, place, and terms of the sale.

(c) The proceeds of the sale of the seized motor vehicle or motorboat shall be deposited into the county general fund.

(d)(1) The county sheriff shall report his or her actions to the court in which the defendant was tried after the county sheriff has made the sale and has turned over the proceeds of the sale to the county treasurer.

(2) The report required by subdivision (d)(1) of this section shall be filed with the court within sixty (60) days from the date of judgment.

(e) A forfeiture of a motor vehicle or motorboat under this section that is encumbered by a bona fide security interest is subject to the



interest of the secured party if the secured party neither had knowledge of nor consented to the offense.

**History.** Acts 1989 (3rd Ex. Sess.), No. 94, § 1; 2013, No. 412, § 1; 2015, No. 299, § 6.

**Amendments.** The 2013 amendment substituted “five (5) years” for “three (3) years” in (a)(1)(A).

The 2015 amendment inserted references to “motorboat” throughout the section; inserted “county” preceding “sheriff”

throughout the section; rewrote (a)(1), inserting (a)(1)(B) and redesignating former (a)(1)(B) as (a)(1)(C); rewrote (a)(2)(A), and substituted “seized motor vehicle or motorboat” for “motor vehicle seized” in (a)(2)(B); rewrote (d)(1); and, in (e), substituted “motor vehicle or motorboat under this section that is” for “conveyance” and “offense” for “act or omission”.

### 5-65-118. Additional penalties — Ignition interlock devices.

(a)(1)(A)(i) The Office of Driver Services shall place a restriction on a person who has violated § 5-65-103 for a first or second offense that requires the person’s motor vehicle to be equipped with a functioning ignition interlock device in addition to any other penalty authorized by this chapter.

(ii) The restriction shall continue until the person has completed his or her mandatory period for using an ignition interlock device.

(iii) The restriction under subdivision (a)(1)(A)(i) of this section does not apply to a person who is arrested for violating § 5-65-103 for a first or second offense if the person was intoxicated by the ingestion of or by the use of a controlled substance.

(B)(i) The office shall place a restriction on a person who has violated § 5-65-103 for a third or subsequent offense that requires the person’s motor vehicle to be equipped with a functioning ignition interlock device in addition to any other penalty authorized by this chapter.

(ii) The restriction shall continue until the person has completed his or her mandatory period for using an ignition interlock device.

(iii) The restriction under subdivision (a)(1)(B)(i) of this section does not apply to a person who is arrested for violating § 5-65-103 for a third or subsequent offense if the person was intoxicated by the ingestion of or by the use of a controlled substance.

(2) The office may issue an ignition interlock restricted license to the person only after the person has verified installation of a functioning ignition interlock device to the office in any motor vehicle the person intends to operate, except for an exemption allowed under § 5-65-123(f).

(3) The office shall establish:

(A) A specific calibration setting no lower than two hundredths of one percent (0.02%) nor more than five hundredths of one percent (0.05%) of alcohol in the person’s blood at which the ignition interlock device will prevent the motor vehicle’s being started; and

(B) The period of time that the person is subject to the restriction.

(b) The office shall do the following after restricting a person’s driving by requiring the use of an ignition interlock device:

(1)(A) State on the record the requirement for and the period of use of the ignition interlock device.

(B) However, if the office restricts the person to using an ignition interlock device in conjunction with the issuance of an ignition interlock restricted license under § 5-65-104, the time the person is required to use the ignition interlock device shall be until the original suspension imposed under § 5-65-104 has been completed;

(2) Ensure that the records of the office reflect that the person may not operate a motor vehicle that is not equipped with an ignition interlock device;

(3) Attach or imprint a notation on the driver's license of a person restricted under this section stating that the person may operate a motor vehicle only if it is equipped with an ignition interlock device;

(4) Require that the person restricted under this section show proof of installation of a certified ignition interlock device prior to the issuance of an ignition interlock restricted license by the office under § 5-65-104;

(5)(A) Require both proof of the installation of an ignition interlock device and periodic reporting by the person for verification of the proper operation of the ignition interlock device.

(B) Proof of the installation of the ignition interlock device for the entire period required by law shall be provided before the person's driving privileges are reinstated;

(6) Require the person to have the ignition interlock device serviced and monitored at least every sixty-seven (67) days for proper use and accuracy by an entity approved by the Department of Health; and

(7)(A) Require the person to pay the reasonable cost of leasing or buying and monitoring and maintaining the ignition interlock device.

(B) The office may establish a payment schedule for the reasonable cost of leasing or buying and monitoring and maintaining the ignition interlock device.

(c) If the person whose driving privilege is restricted under this section cannot provide proof of installation of a functioning ignition interlock device to the office under subsection (a) of this section, the office shall not issue an ignition interlock restricted license as authorized under this section.

(d) The office shall revoke the ignition interlock restricted license and reinstate a driving privilege suspension for the term of the original driving privilege suspension if it finds that a person has violated § 5-65-123.

(e) A person who has had his or her driving privilege suspended or revoked under § 5-65-104 who would otherwise be eligible to obtain an ignition interlock restricted license may petition the office for a hearing, and the office may issue an ignition interlock restricted license as authorized under §§ 5-65-104 and 5-65-205.

(f)(1) The department shall:

(A) Certify the ignition interlock devices for use in this state;

(B) Approve the entities that install and monitor the ignition interlock devices; and

(C) Adopt rules for the certification of the ignition interlock devices and ignition interlock device installation.

(2) The rules shall require an ignition interlock device, at a minimum, to:

(A) Not impede the safe operation of the motor vehicle;

(B) Minimize the opportunities to be bypassed;

(C) Work accurately and reliably in an unsupervised environment;

(D) Properly and accurately measure the person's blood alcohol levels;

(E) Minimize the inconvenience to a sober user; and

(F) Be manufactured by an entity that is responsible for installation, user training, and servicing and maintenance of the ignition interlock device, and that is capable of providing monitoring reports to the office.

(3) The department shall develop a warning label to be affixed to any ignition interlock device used in the state to warn any person of the possible penalties for tampering with or attempting to circumvent the ignition interlock device.

(4) The department shall:

(A) Publish and update a list of certified ignition interlock device manufacturers and approved ignition interlock device installers; and

(B) Periodically provide the list required by subdivision (f)(4)(A) of this section to the office.

**History.** Acts 1993, No. 298, § 1; 1995, No. 1296, § 8; 1999, No. 1468, § 2; 2001, No. 1206, § 2; 2001, No. 1501, § 2; 2005, No. 1234, § 2; 2007, No. 827, § 79; 2014, No. 277, § 13; 2015, No. 299, § 6; 2015, No. 1221, § 1.

**Publisher's Notes.** Acts 2015, No. 1221, § 1 specifically amended this section as amended by Acts 2015, No. 299.

**Amendments.** The 2014 amendment redesignated part of (g)(2)(B)(ii) as (g)(2)(B)(ii)(a); and added (g)(2)(B)(ii)(b).

The 2015 amendment by No. 299 rewrote (a)(1)(A)(i); substituted "driving privilege" for "license" in (a)(1)(A)(ii); rewrote (a)(1)(B); deleted "In accordance with the requirements under the provisions of § 5-65-104" at the beginning of (a)(2); deleted (a)(4); rewrote the introductory language of (b) and (b)(1)(B); rewrote language in (b)(3) and (b)(4); in (b)(5), inserted "both" and substituted "an" for "the" following "installation of"; deleted

former (c) through (g); redesignated former (h) as (c), and inserted "whose driving privilege is" in (c); rewrote and redesignated former (i) and (j) as (d) and (e); redesignated former (k) as (f), and deleted "and regulations" following "rules" twice in (f); and updated internal references.

The 2015 amendment by No. 1221 substituted "shall place" for "may place" in (a)(1)(A)(i); rewrote (a)(1)(A)(ii); added (a)(1)(A)(iii); in (a)(1)(B)(i), substituted "shall place" for "may place" and deleted "and after finding that the person is financially able to afford the ignition interlock device" at the end; rewrote (a)(1)(B)(ii); added (a)(1)(B)(iii); in (b)(1)(B), substituted "until the original suspension imposed under § 5-65-104 has been completed" for "at least the time period remaining on the original suspension imposed under § 5-65-104"; and added (b)(5)(B), and redesignated former (b)(5) as (b)(5)(A).



RESEARCH REFERENCES

**ALR.** Validity, construction, and application of ignition interlock laws. 15 A.L.R.6th 375.

**U. Ark. Little Rock L. Rev.** Survey of

Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

CASE NOTES

**Enforcement.**

The circuit court has no authority to issue a writ of prohibition preventing a municipal court's enforcement of this sec-

tion. *State v. Wilcox*, 325 Ark. 429, 927 S.W.2d 337 (1996).

**Cited:** *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996).

5-65-119. Distribution of fee.

- (a)(1) The Office of Driver Services shall charge a fee to be calculated under subsection (b) of this section for reinstating a driving privilege suspended or revoked because of an arrest for violating § 5-65-103 or § 5-65-205.
- (2) The fee under subdivision (a)(1) of this section shall be distributed as follows:
- (A) Seven percent (7%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Office of Alcohol Testing of the Department of Health;

(B) Thirty-three percent (33%) of the revenues derived from this fee shall be deposited as special revenues into the State Treasury into the Constitutional Officers Fund and the State Central Services Fund as a direct revenue to be used by the Office of Driver Services for use in supporting the administrative driver's licensing revocation and sanctions programs provided for in this subchapter;

(C) Ten percent (10%) of the revenues derived from this fee shall be deposited into the State Treasury, and the Treasurer of State shall credit them as general revenues to the various funds in the respective amounts to each and to be used for the purposes as provided in the Revenue Stabilization Law, § 19-5-101 et seq.; and

(D) Fifty percent (50%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues to the credit of the Department of Arkansas State Police Fund.
- (b)(1)(A) The fee under subsection (a) of this section shall be calculated by multiplying one hundred fifty dollars (\$150) by each separate occurrence of an offense resulting in an administrative suspension order under § 5-65-103 or § 5-65-205 unless the administrative suspension order has been removed because:
- (i) The person has been found not guilty of the offense by a circuit court or district court; or

(ii) A de novo review of the administrative suspension order by the Office of Driver Services results in the removal.

(B) The fee under subsection (a) of this section is supplemental to and in addition to any fee imposed under § 5-65-304, § 5-65-310, § 27-16-508, or § 27-16-808.

(2) As used in this subsection, “occurrence” means each separate calendar date when an offense or offenses take place.

**History.** Acts 1995, No. 802, § 2; 2001, No. 561, § 6; 2003, No. 1001, § 1; 2005, No. 1992, § 1; 2013, No. 361, § 3; 2015, No. 299, § 6.

**A.C.R.C. Notes.** Acts 1995, No. 802, § 5, provided, in part, that this section, “regarding the charging of the reinstatement fee for the driver licenses suspended for driving while intoxicated offenses shall be effective on July 1, 1995.”

**Amendments.** The 2013 amendment, in (a), inserted “saliva” following “blood,

breath” and “concentration” preceding “or controlled substance”.

The 2015 amendment rewrote and redesignated former (a) as (a)(1) and the introductory language of (a)(2); redesignated former (a)(1) through (a)(4) as (a)(2)(A) through (a)(2)(D); substituted “The fee under subsection (a) of this section” for “The reinstatement fee” in (b)(1)(A); and inserted “subsection (a) of” in (b)(1)(B).

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

### 5-65-120. Restricted driving permit.

(a) The Office of Driver Services may modify the administrative denial or suspension of a driver’s license under § 5-65-402 after a hearing or upon the request of a person whose driving privilege has been denied or suspended by issuing a restricted driving permit if:

(1) The denial or suspension results in a case of extreme and unusual hardship; and

(2) After reviewing the person’s driving record for the five (5) years previous to the denial, revocation, or suspension of his or her driving privilege, the office determines that:

(A) The person:

(i) Is not a multiple traffic law offender; or

(ii) Does not present a threat to the general public; and

(B) Other adequate means of transportation do not exist for the person except to allow the person to drive in any of the following situations:

(i) To and from the person’s place of employment;

(ii) In the course of the person’s employment;

(iii) To and from an educational institution for the purpose of attending a class if the person is enrolled and regularly attending a class at the institution;

(iv) To and from an alcohol education program or alcoholism treatment program for drunk drivers; or

(v) To and from a hospital or clinic for medical treatment or care for an illness, disease, or other medical condition of the person or a family member.

- (b) The issuance of a restricted driving permit under this section is solely within the discretion of the office.
- (c) A restricted driving permit issued under this section shall state the specific times and circumstances under which driving is permitted.
- (d) A restricted driving permit issued under this section shall not be granted to a person whose driving privilege was suspended or revoked for violating § 5-65-103, § 5-65-205, § 5-65-303, or § 5-65-310, a second or subsequent time within five (5) years of the first offense.

**History.** Acts 1995, No. 802, §§ 3, 5; 1997, No. 1325, § 3; 1999, No. 1077, § 14; 2007, No. 827, § 80; 2009, No. 748, § 29; 2009, No. 1293, § 2; 2015, No. 299, § 6.

**A.C.R.C. Notes.** As enacted by Acts 1995, No. 802, § 3, subsection (a) of this section began: “Upon the effective date of

this act”.

**Publisher’s Notes.** Acts 1995, No. 802, § 5(a), is also codified, in part, as § 5-65-205(c).

**Amendments.** The 2015 amendment rewrote the section.

CASE NOTES

**Driving Outside of Restrictions.**

Evidence was substantial to support a conviction for driving on a suspended license under this section because defendant was not following the restrictions given on his restricted driving permit. The Arkansas Office of Driver Services had

issued a restricted permit for defendant to drive from his home in Fayetteville to school, drug-and-alcohol education classes, and for medical emergencies. *Fiveash v. State*, 2015 Ark. App. 187, 458 S.W.3d 774 (2015).

5-65-121. Victim impact panel attendance — Fee.

- (a)(1) A person whose driving privileges are suspended or revoked for violating § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, or § 3-3-203 shall attend a victim impact panel sponsored by an organization approved by the Division of Behavioral Health Services of the Department of Human Services.
- (2) The organization selected by the division shall be an organization that provides statewide services to victims of drunk driving.
- (b)(1) The organization approved by the division may collect a program fee of ten dollars (\$10.00) per enrollee to offset program costs to be remitted to the organization.
- (2) The organization approved by the division shall provide proof of attendance and completion to the person required to attend the victim impact panel upon completion of the victim impact panel.

**History.** Acts 2009, No. 946, § 1; 2013, No. 1107, § 6; 2015, No. 299, § 6.

**Amendments.** The 2013 amendment substituted “Division of Behavioral

Health Services” for “Office of Alcohol and Drug Abuse Prevention” in (a)(1).

The 2015 amendment substituted “division” for “office” in (a)(2) and twice in (b).

5-65-122. [Repealed.]

**Publisher’s Notes.** This section, concerning driving while intoxicated as a sixth or subsequent offense, was repealed

by Acts 2015, No. 299, § 6. The section was derived from Acts 2013, No. 1268, § 3.



For current law, see § 5-65-111.

**5-65-123. Offenses involving a motor vehicle equipped with an ignition interlock device.**

(a) A person commits the offense of unlawfully allowing another person to start or attempt to start a motor vehicle equipped with an ignition interlock device if he or she:

(1) Has had his or her driving privileges restricted under § 5-65-118 and cannot operate or be in actual physical control of a motor vehicle that is not equipped with an ignition interlock device;

(2) Knowingly solicits or allows a person to start or attempt to start a motor vehicle equipped with an ignition interlock device; and

(3) Has the purpose to operate or be in actual physical control of the motor vehicle.

(b) A person commits the offense of unlawfully starting or attempting to start a motor vehicle equipped with an ignition interlock device for another person if he or she knowingly starts or attempts to start a motor vehicle equipped with an ignition interlock device for another person who is restricted from operating or being in actual physical control of a motor vehicle that does not have a functioning ignition interlock device.

(c) A person commits the offense of tampering with an ignition interlock device if he or she knowingly tampers with or attempts to circumvent the operation of an ignition interlock device that has been installed in a motor vehicle.

(d) A person commits the offense of providing a motor vehicle not equipped with a functioning ignition interlock device to another person if he or she:

(1) Knowingly provides a motor vehicle not equipped with a functioning ignition interlock device to another person who is restricted from operating or being in actual physical control of a motor vehicle that does not have a functioning ignition interlock device; and

(2) Knows or should have known that the other person was restricted from operating or being in actual physical control of a motor vehicle not equipped with an ignition interlock device.

(e) A person who violates this section is upon conviction guilty of a Class A misdemeanor.

(f) It is a defense to prosecution under this section if:

(1) A person starts or attempts to start a motor vehicle equipped with an ignition interlock device for the purpose of safety or mechanical repair of the ignition interlock device or the motor vehicle and the person subject to the restriction does not operate the motor vehicle; or

(2)(A) The court has previously found that a person is required to operate a motor vehicle in the course and scope of his or her employment and, if the motor vehicle is owned by the employer but does not have a functioning ignition interlock device installed, that the person may operate that motor vehicle during regular working hours for the purposes of his or her employment if:

- (i) The employer has been notified of the driving privilege restriction; and
  - (ii) Proof of that notification is with the motor vehicle.
- (B) However, the defense in subdivision (f)(2)(A) of this section does not apply if:
- (i) The business entity that owns the motor vehicle is owned or controlled by the person who is prohibited from operating a motor vehicle not equipped with an ignition interlock device; or
  - (ii) The driving privilege restriction is the result of the offender's second or subsequent offense.

**History.** Acts 2015, No. 299, § 6.

SUBCHAPTER 2 — CHEMICAL ANALYSIS OF BODY SUBSTANCES

SECTION.	SECTION.
5-65-201. Rules and regulations.	5-65-206. Evidence in prosecution — Presumptions.
5-65-202. Implied consent.	5-65-207. Alcohol testing devices.
5-65-203. Administration of a chemical test.	5-65-208. Motor vehicle and motorboat accidents — Testing required.
5-65-204. Validity — Approved methods.	
5-65-205. Refusal to submit to a chemical test.	

**Effective Dates.** Acts 1969, No. 17, § 2: Jan. 30, 1969. Emergency clause provided: “It has been found and is declared by the General Assembly of Arkansas that the drinking driver is a major cause of automobile accidents; that the ability of a driver is seriously impaired when there is 0.10 percent or more by weight of alcohol in the driver’s blood, urine, breath or other bodily substance; and that enactment of this act will provide for more effective control of the drinking driver. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.”

Acts 1969, No. 106, § 4: Feb. 25, 1969. Emergency clause provided: “It has been found and is declared by the General Assembly of Arkansas that the drinking driver is a major cause of automobile accidents; that the ability of a driver is seriously impaired when there is 0.10 percent or more by weight of alcohol in the driver’s blood, urine, breath or other bodily substance; and that enactment of this act is immediately necessary to provide for more effective control of the drink-

ing driver. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.”

Acts 1971, No. 306, § 2: Mar. 17, 1971. Emergency clause provided: “It is hereby found and determined by the General Assembly that doctors, nurses and hospitals throughout the State are called upon by law enforcement officers to withdraw blood for purposes of determining alcoholic content thereof from individuals suspected of driving while under the influence of intoxicating liquors; that in the performance of such duties, doctors, nurses and hospitals are assisting the State of Arkansas in the enforcement of laws designed to promote motor vehicle safety; and that doctors, nurses and hospitals should not be held liable for violating any of the criminal laws in connection with the administering of such blood tests, nor should they be held liable for civil damages in connection therewith, unless such services are performed with negligence; and that the immediate passage of this Act is necessary to clarify the liabili-



ties of doctors, nurses and hospitals in the administration and enforcement of the implied consent law of this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 660, § 3: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that physicians, persons under the direction and supervision of physicians, and institutions throughout the State are called upon by law enforcement officers to withdraw blood for purposes of determining alcoholic content thereof from individuals suspected of driving while under the influence of intoxicating liquors; that in the performance of such duties physicians, persons under the direction and supervision of physicians and institutions are assisting the State of Arkansas in the enforcement of laws designed to promote motor vehicle safety; and that such persons and institutions shall not be held liable for violating any of the criminal laws in connection with the administering of such blood tests, nor should they be held liable for civil damages in connection therewith, unless such services are performed with negligence; and that the immediate passage of this Act is necessary to clarify the liabilities of doctors, persons under the direction and supervision of physicians, and institutions in the administration and enforcement of the implied consent law of this State. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 549, § 19: Mar. 21, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this state, and that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior. Further, it is found that increased income derived from the levying of such penalties can best be utilized to provide immediate

alcohol and drug safety and rehabilitation and treatment programs both to prevent an increase in the use of intoxicating alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses. Therefore, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1985, No. 169, § 3: Feb. 22, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that hospitals, other institutions and persons working under the direction and supervision of physicians are not accorded tort immunity for the withdrawal of blood to determine alcohol or controlled substance content; that such immunity existed prior to the enactment of the DWI Law in 1983; that the elimination of the tort immunity was inadvertent and should be immediately reinstated. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 75, § 3: Feb. 19, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law identifying circumstances under which persons who operate or are in actual physical control of a motor vehicle are deemed to have given consent to chemical tests to determine whether they have been driving while intoxicated does not apply when the driver is involved in a nonfatal accident and is not actually operating the motor vehicle at the time the police arrive and is not arrested as a result of the accident; that the failure to include such circumstance was inadvertent and should be immediately corrected in order to provide for the proper enforcement of our DWI law; and that this act will make that correction in the DWI law. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 277, § 3: Mar. 17, 1987. Emergency clause provided: "It is hereby



found and determined by the General Assembly that at least one trial court judge has indicated that the DWI implied consent statute might be unconstitutional because no maximum period for the suspension of operators' licenses is indicated; that the implied consent statute is a vital weapon in combatting drunken driving; and that this act will cure the constitutional objections. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 132, § 5: Feb. 15, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of Ark. Code Ann. § 5-65-202(a), as interpreted by the Supreme Court of Arkansas and Arkansas Court of Appeals, are inadequate regarding the conduct of persons whom the General Assembly intended to be subject to the provisions of the implied consent law, in that the courts have construed § 5-65-202(a)(3) to be applicable only where a police officer physically stopped a moving vehicle and possessed reasonable suspicion to believe that the person was DWI prior to the stop, see *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985); *Gober v. State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987); that § 5-65-202(a)(3) is being amended to implement the General Assembly's intent to have the implied consent law encompass conduct of persons whom police officers have reasonable cause to believe have committed the offense of DWI, at the time such persons are arrested for DWI. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, safety, and welfare shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 9: Mar. 27, 1995: Emergency clause provided: "It is hereby found and determined by the General Assembly that this act provides for adminis-

trative revocation and suspension of drivers' licenses for persons charged with the offense of driving while intoxicated; that based on Arkansas Crime Information Center statistics on DEI arrests, the Office of Driver Services could anticipate up to sixteen thousand (16,000) hearings if everyone arrested requested a hearing; that funds will be necessary for additional staff to handle this program along with significant costs to prepare for and implement this program; and that this act is necessary immediately in order to insure that sufficient funds are available for the financial stability of this program. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 5(a): Sections 1, 3, and 4 effective for all arrests or offenses occurring on or after July 1, 1996.

Acts 1995, No. 802, § 5(b): Section 2 effective July 1, 1995.

Acts 2005, No. 886, § 3: Mar. 16, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that confusion exists regarding the admissibility of drug analyses made by the State Crime Laboratory in certain cases due to a recent decision by the Arkansas Court of Appeals; that a standard of admissibility of analyses made by the State Crime Laboratory must be established; and that this act is immediately necessary in order to prosecute pending cases and cases filed in the future. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

## RESEARCH REFERENCES

**ALR.** Admissibility in criminal case of blood alcohol test where blood was taken despite defendant's objection or refusal to

submit to test. 14 A.L.R.4th 690.

Destruction of ampoule used in alcohol breath test as warranting suppression of

result of test. 19 A.L.R.4th 509.

Admissibility in criminal case that accused refused to take sobriety test. 26 A.L.R.4th 1112.

Motorist's right to private sobriety test. 45 A.L.R.4th 11.

**Ark. L. Rev.** Case Note, South Dakota v. Neville: Refusal to Submit to a Blood-Alcohol Test as Evidence of Intoxication, 37 Ark. L. Rev. 702.

**U. Ark. Little Rock L.J.** Legislation of the 1983 General Assembly, Criminal Law, 6 U. Ark. Little Rock L.J. 613.

Legislative Survey, Torts, 8 U. Ark. Little Rock L.J. 607.

Survey — Evidence, 10 U. Ark. Little Rock L.J. 199.

## 5-65-201. Rules and regulations.

The Department of Health may promulgate rules and regulations reasonably necessary to carry out the purposes of this subchapter.

**History.** Acts 1969, No. 106, § 2; A.S.A. 1947, § 75-1046.

### CASE NOTES

**Cited:** Watson v. Frierson, 272 Ark. (1986); Porter v. State, 82 Ark. App. 589, 316, 613 S.W.2d 824 (1981); Hughes v. State, 17 Ark. App. 34, 705 S.W.2d 455 120 S.W.3d 178 (2003).

## 5-65-202. Implied consent.

(a) A person who operates a motorboat on the waters of this state or a motor vehicle or is in actual physical control of a motorboat on the waters of this state or a motor vehicle is deemed to have given consent, subject to § 5-65-203, to one (1) or more chemical tests of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood if:

(1) The person is arrested for any offense arising out of an act alleged to have been committed while the person was driving or boating while intoxicated or driving or boating while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood;

(2) The person is involved in an accident while operating or in actual physical control of a motorboat on the waters of this state or a motor vehicle; or

(3) At the time the person is arrested for driving or boating while intoxicated, the law enforcement officer has reasonable cause to believe that the person, while operating or in actual physical control of a motorboat on the waters of this state or a motor vehicle, is intoxicated or has an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood.

(b) A person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and

one (1) or more chemical tests may be administered subject to § 5-65-203.

**History.** Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 75, § 1; 1993, No. 132, § 1; 2001, No. 561, § 7; 2009, No. 431, § 1; 2013, No. 361, § 4; 2015, No. 299, § 7; 2015, No. 1155, § 11.

**Amendments.** The 2013 amendment inserted “saliva” following “blood, breath” in (a).

The 2015 amendment by No. 299 inserted “motorboat on the waters of this

state or a” and “or boating” throughout the section; in the introductory language of (a), substituted “A” for “Any”, deleted “in this state” preceding “is deemed to”, and deleted “the provisions of” following “subject to”; and, in (b), substituted “A” for “Any” and deleted “the provisions of” following “subject to”.

The 2015 amendment by No. 1155 inserted “concentration” following “alcohol” in the introductory language of (a).

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Criminal Procedure, 10 U. Ark. Little Rock L.J. 567.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

CASE NOTES

ANALYSIS

- Constitutionality.
- In General.
- Purpose.
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- Conviction.
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- Operation or Control of Vehicle.
- Reasonable Cause.
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- Submission to Testing.
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Constitutionality.

Blood alcohol test results are admissible under the implied consent law; this law is valid and does not violate the provision against self-incrimination. Steele v. State, 284 Ark. 340, 681 S.W.2d 354 (1984).

Admission into evidence of defendant's refusal to submit to a chemical test did not violate her Fifth Amendment right against self-incrimination. Weaver v. City of Fort Smith, 29 Ark. App. 129, 777 S.W.2d 867 (1989).

In General.

Motorists give an implied consent to chemical tests for alcoholic content of blood. Mercer v. State, 256 Ark. 814, 510 S.W.2d 539 (1974).

Purpose.

The intent of the General Assembly in passing this section was to mandate alcohol testing for a person stopped by a law enforcement officer when that officer has reasonable cause to believe the driver is drunk. Parsons v. State, 313 Ark. 224, 853 S.W.2d 276 (1993).

Additional Tests.

Requiring that a person be advised of his right to an additional test, under the circumstances outlined in subsection (b) of this section would render that provision meaningless. It is clear that a person incapable of refusing or consenting to being tested for blood alcohol levels need not be advised of his right to additional tests, because such a literal application of § 5-65-204(e) (now (d)) would lead to absurd consequences. Clark v. State, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

Admonition Forms.

Arkansas does not have a statutorily prescribed implied-consent admonition



form. *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993).

### **Assistance of Counsel.**

There is no constitutional right to counsel in connection with this chemical test. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Defendant's conviction was affirmed even though he claimed that he was confused by the conduct of the law enforcement officers, in that after being given his Miranda rights, he was then read his rights under the implied consent statute, and he was told that he did not have a right to consult with his attorney prior to taking the breathalyzer test. *Carroll v. State*, 35 Ark. App. 141, 814 S.W.2d 913 (1991).

### **Conviction.**

A defendant does not have to be convicted of DWI before he can be convicted of refusing to submit to a blood test. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992); *Huitt v. State*, 39 Ark. App. 69, 837 S.W.2d 482 (1992).

The Court of Appeals held that *Gober v. State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987), was wrongly decided and overruled *Gober* to the extent that it holds that a DWI conviction is a prerequisite to a conviction for refusing a blood alcohol test pursuant to § 5-65-202(a)(1) (Supp. 1989). *Huitt v. State*, 39 Ark. App. 69, 837 S.W.2d 482 (1992).

### **Evidence.**

Arrest is not necessarily a prerequisite before blood alcohol content, determined pursuant to sample, would be admissible in evidence. *Mercer v. State*, 256 Ark. 814, 510 S.W.2d 539 (1974) (decision under prior law).

Where defendant was stopped by police officers because of his driving and after the officers talked with defendant, defendant turned and shot officer and thereafter both officers and defendant were injured and taken to hospital and the treating physician ordered a blood test on defendant and such defendant was charged with assault with intent to kill, the provisions of §§ 5-65-202 — 5-65-205 with regard to the taking of a blood test had no application. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision under prior law).

Evidence held sufficient to find that there was ample cause for the officer to require defendant to submit to a breath test. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

Since defendant's parked car created a traffic hazard, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger of injury to persons or property was being committed by the defendant; thus, the stop was reasonable under Ark. R. Crim. P. 3.1, and the evidence of driving while intoxicated was admissible. *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985) (decision under prior law).

Conviction for violation of this section upheld where defendant failed the field sobriety tests and refused to submit to a breathalyzer test, and where two police officers smelled intoxicants on defendant; the evidence was sufficient for police to have a reasonable belief that defendant was intoxicated. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

### **Lesser-Included Offenses.**

Violation of the implied consent law is not a lesser-included offense of driving while intoxicated, and the offense of driving while intoxicated is not a lesser-included offense of violation of the implied consent law. *Frana v. State*, 323 Ark. 1, 912 S.W.2d 930 (1996).

### **Operation or Control of Vehicle.**

The phrase "while operating or in actual physical control of a motor vehicle" sets forth a condition precedent to a violation of the implied-consent law as set forth in subsection (a)(3); thus, a defendant was entitled to a reversal of his conviction under this section where he was not in actual physical control of a vehicle when he refused to take a breath test. *Stephenson v. City of Fort Smith*, 71 Ark. App. 190, 36 S.W.3d 754 (2000).

### **Reasonable Cause.**

This section does not expressly require that an officer develop a reasonable belief of intoxication before a stop is made. *Parsons v. State*, 313 Ark. 224, 853 S.W.2d 276 (1993).

The time a police officer must develop a reasonable belief of intoxication is only at the time of arrest. *Parsons v. State*, 313 Ark. 224, 853 S.W.2d 276 (1993).

Police officer's observations of the smell of alcohol and defendant's bloodshot eyes, coupled with the fact that defendant refused a portable breath test and admitted to the officer that he had been drinking, were sufficient to constitute reasonable cause that he was intoxicated; the trial court's ruling denying defendant's motion to suppress the breathalyzer results was not clearly against the preponderance of the evidence. *Hilton v. State*, 80 Ark. App. 401, 96 S.W.3d 757 (2003).

#### **Search Warrant.**

In a driving while intoxicated case, a trial court did not err by denying a motion to suppress the results of a blood-alcohol test taken pursuant to a search warrant because the chemical test that may not be given under subsection (a) of § 5-65-205 after the accused refuses to submit to a chemical test is limited to the warrantless test authorized by this section. *Metzner v. State*, 2015 Ark. 222, 462 S.W.3d 650 (2015).

#### **Submission to Testing.**

A defendant need not be apprised of the consequences of refusing to submit to a chemical test. *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993).

No U.S. Const. amend. IV violation occurred when a trial court denied defen-

dant's motion to suppress evidence of defendant's refusal to take a breath test because defendant's consent to testing was implied and no warrant was required for the search. *Tiller v. State*, 2014 Ark. App. 431, 439 S.W.3d 705 (2014).

#### **Testing Options.**

Where the officer gave the motorist the option of submitting to either a urine or a blood test, the motorist could not properly refuse without penalty. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

#### **Violation.**

A violation of this section occurs when a police officer has reasonable cause to believe the operator or person in actual physical control of a motor vehicle is intoxicated, the police officer directs the operator to submit to a blood test, and the operator refuses to do so. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992).

**Cited:** *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990); *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

### **5-65-203. Administration of a chemical test.**

(a) One (1) or more chemical tests authorized in § 5-65-202 shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating or in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood.

(b)(1) The law enforcement agency by which the law enforcement officer is employed shall designate which chemical test or chemical tests shall be administered, and the law enforcement agency is responsible for paying any expense incurred in conducting the chemical test or chemical tests.

(2) If the person tested requests that additional chemical test or chemical tests be made as authorized in § 5-65-204(d), the cost of the additional chemical test or chemical tests shall be borne by the person tested, unless the person is found not guilty, in which case the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test or chemical tests.



(3) If a person objects to the taking of his or her blood for a chemical test as authorized in this chapter, the breath, saliva, or urine of the person may be used for the chemical test.

**History.** Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 75, § 1; 2001, No. 561, § 8; 2009, No. 431, § 2; 2013, No. 361, § 5; 2015, No. 299, § 8.

**Amendments.** The 2013 amendment,

in (b)(3), inserted “saliva” and substituted “for the chemical test” for “to make the chemical analysis”.

The 2015 amendment added “of a chemical test” in the section heading; inserted “motorboat on the waters of this state or a” in (a); and substituted “a person” for “any person” in (b)(3).

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — Criminal Procedure, 10 U. Ark. Little Rock L.J. 567.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

## CASE NOTES

### ANALYSIS

Applicability.

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### Applicability.

Where defendant was stopped by police officers because of his driving and after the officers talked with defendant, defendant turned and shot officer and thereafter both officers and defendant were injured and taken to hospital and the treating physician ordered a blood test on defendant and such defendant was charged with assault with intent to kill, the provisions of §§ 5-65-202 — 5-65-205 with regard to the taking of a blood test had no application. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision prior to 1983 amendment).

### Additional Tests.

Where the evidence disclosed that the arresting officer did not advise the defendant driver that if he objected to the taking of his blood for a blood alcohol test, a breath or urine test might be taken at his own expense, did not mean that all testimony with regard to the test was inadmissible under the provisions of § 5-65-204; since the defendant did not have any test results introduced into evidence

against him, he was not deprived of any statutory rights when the trial court permitted the arresting officer to testify that the defendant refused to submit to a blood alcohol test. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

The statutory remedy for a person who is not afforded the opportunity to obtain an additional test as provided under this section is exclusion of any chemical test taken at the direction of law enforcement officers pursuant to § 5-65-204. *Grayson v. State*, 30 Ark. App. 105, 783 S.W.2d 75 (1990).

### Certification of Officers.

The Court of Appeals could not consider the defendant's argument that the state failed to prove that the police officer was certified where the defendant failed to object to the police officer's testimony or question his status upon cross-examination, but instead first raised the issue in his motion for directed verdict at the close of the state's case. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

### Expenses.

If a particular law enforcement agency designates that chemical tests will be administered, the agency is responsible for paying any expenses involved, but if the accused requests the tests, he shall bear the expense. *Ballew v. State*, 305 Ark. 542, 809 S.W.2d 374 (1991).



**Reasonable Cause.**

Evidence held sufficient to find that there was ample cause for the officer to require defendant to submit to a breath test. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

Where defendant was not arrested for any act committed while driving while intoxicated, nor was he involved in a fatal accident or stopped by an officer who had reasonable cause to believe that he was intoxicated, defendant was not deemed to have consented to take the blood alcohol test even though he was found in physical control of a vehicle while intoxicated. *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985).

Since defendant's parked car created a traffic hazard, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger of injury to persons or property was being committed by the defendant; thus, the stop was reasonable under Ark. R. Crim. P. 3.1, and the evidence of driving while

intoxicated was admissible. *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985).

Where an officer detects a defendant's flushed appearance, slurred speech, and uneasiness on his feet, along with the odor of alcohol, ample cause for requiring the breath test exists. *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992).

**Testing Options.**

Where the officer gave the motorist the option of submitting to either a urine or a blood test, the motorist could not properly refuse without penalty. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

**Cited:** *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992); *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996); *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

**5-65-204. Validity — Approved methods.**

(a)(1) As used in this chapter, § 5-10-105, § 5-75-101 et seq., and § 5-76-101 et seq., "alcohol concentration" means either:

(A) Grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood; or

(B) Grams of alcohol per two hundred ten liters (210 l) of breath.

(2) The alcohol concentration of urine, saliva, or other bodily substance is based upon grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood, the same being percent weight per volume or percent alcohol concentration.

(b)(1)(A) A chemical test made to determine the presence and amount of alcohol in a person's blood, urine, saliva, or breath to be considered valid under this chapter shall be performed according to a method approved by the Department of Health and State Board of Health or by an individual possessing a valid certificate issued by the department for this purpose.

(B) The department may:

(i) Approve satisfactory techniques or methods for the chemical test;

(ii) Ascertain the qualifications and competence of an individual to conduct the chemical test; and

(iii) Issue a certificate that is subject to termination or revocation at the discretion of the department.

(C)(i) An auxiliary law enforcement officer appointed as a reserve law enforcement officer and certified by the department in the operation of an instrument used to determine the alcohol content of

the breath may operate an instrument used to determine the alcohol content of the breath under this chapter.

(ii) The department shall promulgate rules to implement subdivision (b)(1)(C)(i) of this section.

(2) However, a method of chemical analysis of a person's blood, urine, saliva, or other bodily substance made by the State Crime Laboratory for determining the presence of one (1) or more controlled substances or any intoxicant is exempt from approval by the department or the board.

(c)(1) When a person submits to a blood test at the request of a law enforcement officer under a provision of this section, blood may be drawn by a physician or a person acting under the direction and supervision of a physician.

(2) The limitation in subdivision (c)(1) of this section does not apply to the taking of a breath, saliva, or urine specimen.

(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.

(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.

(d)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person in writing of the right provided in subdivision (d)(1) of this section and that if the person chooses to have an additional chemical test and the person is found not guilty, the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.

(3) The refusal or failure of a law enforcement officer to advise a person of the right provided in subdivision (d)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (d)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

(e) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the chemical test shall be made available to the person or to his or her attorney.

**History.** Acts 1969, No. 106, §§ 1, 2; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; 1985, No. 169, § 1; A.S.A. 1947, §§ 75-1045, 75-1046; Acts 1989, No. 361, § 1; 2001, No. 561, §§ 9, 10; 2005, No. 886, § 1; 2011, No. 1240, § 1; 2013, No. 361, § 6.

**Amendments.** The 2011 amendment, in (b)(1)(A), substituted "analysis" for



“analyses”, “this chapter” for “the provisions of this act”, and “Department of Health” for “Division of Health of the Department of Health and Human Services”; substituted “certificate” for “permit” in (b)(1)(A) and (b)(1)(B)(iii); substituted “department” for “division” in (b)(1)(A), the introductory language of (b)(1)(B), and (b)(1)(B)(iii); and inserted (b)(1)(C).

The 2013 amendment rewrote the introductory language of (a)(1); substituted

“urine, saliva, or other bodily substance” for “other bodily substances” in (a)(2); substituted “chemical test” for “chemical analysis” in (b)(1)(A) and (b)(1)(B); inserted “saliva” and “and State Board of Health” in (b)(1)(A); in (b)(2), inserted “saliva” and substituted “department” for “division”; deleted former (c); and redesignated (d) as (c); and, in (c)(2), substituted “subdivision (c)(1)” for “subdivision (d)(1)” and inserted “saliva”.

RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Seventeenth Annual Survey of Arkansas Law — Criminal Procedure, 17 U. Ark. Little Rock L.J. 449.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

CASE NOTES

ANALYSIS

- Construction.
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**Construction.**

Section 5-65-103, as amended in 2001, sets the legal limit for blood alcohol concentration and must be read in conjunction with subdivision (a)(1) of this section, which defines the alcohol concentration computation; hence, where defendant stipulated that his blood alcohol concentration as revealed in breathalyzer test results was 0.109, his conviction for per se violation of § 5-65-103(b) (see now (a)(2)) was affirmed on appeal. *Bramlett v. State*, 356 Ark. 200, 148 S.W.3d 278 (2004).

**Applicability.**

This section is limited to those tests ordered either by a police officer or a defendant in connection with a criminal charge relating to sobriety. *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

The requirements set out in this section need not be met when the blood test is not ordered by the police or the defendant for use as evidence at trial, but has been ordered by hospital personnel for their own use in connection with the treatment of a patient. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

**Additional Tests.**

Where there was other evidence of intoxication which made, of itself, a question of fact, the introduction of evidence that the defendant was not advised of his right to have a person of his choice, in addition to the officer giving the test, to administer the breatholator test furnished no basis for the granting of the motion to dismiss the charge of driving a motor vehicle while under the influence of intoxicants. *Small v. City of Little Rock*, 253 Ark. 7, 484 S.W.2d 81 (1972).

Where defendant had refused to take an intoximeter test, the introduction of the refusal into evidence on the charge of driving while under the influence of intoxicants was not prejudicial even though defendant had not been advised that the arresting officer would have assisted him in securing an independent medical opinion. *Fletcher v. City of Newport*, 260 Ark. 476, 541 S.W.2d 681 (1976).

Blood alcohol level breathalyzer test results were admissible in a prosecution for driving while intoxicated where the ar-



resting officers advised the defendant that he could request a different type of test, but the defendant did not request a different test, even though the officers failed to advise him that he had the right to have a qualified person administer additional tests of his choosing. *Doyle v. Jackson County Nat'l Bank*, 284 Ark. 303, 681 S.W.2d 371 (1984).

Where the evidence disclosed that the arresting officer did not advise the defendant driver that if he objected to the taking of his blood for a blood alcohol test, a breath or urine test might be taken at his own expense, did not mean that all testimony with regard to the test was inadmissible under the provisions of subsection (e) (now (d)); since the defendant did not have any test results introduced into evidence against him, he was not deprived of any statutory rights when the trial court permitted the arresting officer to testify that the defendant refused to submit to a blood alcohol test. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

It is clear that subsection (e) (now (d)) requires that a person be advised of his or her right to a second test, but it does not dictate that a written waiver of that test be obtained; therefore, a written waiver of rights form is not a mandatory prerequisite of the foundation needed to be laid prior to introduction of any breathalyzer test results. *Robertson v. State*, 12 Ark. App. 243, 674 S.W.2d 947 (1984).

Written warning held to be sufficient compliance with this section since subsection (e) (now (d)) only requires that an individual be advised that he can have tests "in addition to any test administered at the direction of a law enforcement officer." *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

This section only requires a police officer's reasonable assistance in helping an accused obtain an additional blood alcohol test; it does not require the officer to pay for the additional test. *Williford v. State*, 284 Ark. 449, 683 S.W.2d 228 (1985).

Testimony held to constitute sufficient evidence by which the trier of fact could have concluded that the defendant did not ask for a different test. *Girdner v. City of Kensett*, 285 Ark. 70, 684 S.W.2d 808 (1985).

Where the police, after administering a blood test to the defendant, advised the

defendant that he had a right to an additional blood or urine test, the police substantially complied with the requirements of subsection (e) (now (d)) even though they did not mention an additional breath test; substantial compliance with subsection (e) (now (d)) is all that is required for the result of the test to be admitted into evidence. *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985).

Where defendant was fully advised of his right to an additional test, and his request that his own physician in another city perform the test was refused, the results of the intoxilyzer test were properly admitted; the provision for assistance does not extend to transporting the accused to another locale, when there is no showing that facilities at the place of arrest are inadequate to perform the necessary tests. *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985).

Breathalyzer test results were inadmissible where defendant, who was not advised of the full range of tests available to him, requested an additional test and this test was not given nor was defendant aided in obtaining another test. *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985).

The results of the breath test were admissible even though the defendant was not advised that he had a right to an additional breath test pursuant to this section where he was asked if he wanted a blood test and he was allowed five or six phone calls to raise the money for a blood test, even though he was unsuccessful, and no additional test was administered. *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985).

Defendant was properly advised of his right to a second test. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Defendant was not denied due process of law because he was not informed of his right to an independent test for intoxication. There is no such requirement unless he is given a test at the direction of a law enforcement officer. *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988).

Requiring that a person be advised of his right to an additional test, under the circumstances outlined in § 5-65-202(b) would render that provision meaningless. It is clear that a person incapable of refusing or consenting to being tested for blood alcohol levels need not be advised of

his right to additional tests, because such a literal application of subsection (e) (now (d)) of this section would lead to absurd consequences. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

Law enforcement personnel adequately assisted defendant in obtaining additional blood alcohol testing as required by this section. *Fiegel v. City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989).

The statutory remedy for a person who is not afforded the opportunity to obtain an additional test as provided under § 5-65-203 is exclusion of any chemical test taken at the direction of law enforcement officers pursuant to subsection (e) (now (d)). *Grayson v. State*, 30 Ark. App. 105, 783 S.W.2d 75 (1990).

Where no breathalyzer test was completed, the arresting officer was not required to advise the defendant of his right to an additional chemical test or assist him in obtaining it. *McEntire v. State*, 305 Ark. 470, 808 S.W.2d 762 (1991).

Where a breathalyzer test was refused by defendant, there was no requirement under this section that an independent chemical test be afforded her. *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992).

In order to comply with the "permit and assist" provision of subdivision (e)(2) (now (d)(3)) of this section, the officer must provide only such assistance for additional testing as is reasonable at the place and time of the particular case. *Hudson v. State*, 43 Ark. App. 190, 863 S.W.2d 323 (1993).

Assistance offered to the defendant by the police officer was reasonable under the circumstances and the officer's actions constituted substantial compliance with this section. *Hudson v. State*, 43 Ark. App. 190, 863 S.W.2d 323 (1993).

Trial court properly admitted blood-alcohol test results, although destruction of sample prevented additional tests, where defendant waived his right to his own analysis, there was no evidence of bad faith, exculpatory value of sample was not apparent, and defendant put on expert evidence that test results could be inaccurate. *Kenyon v. State*, 58 Ark. App. 24, 946 S.W.2d 705 (1997).

Trial court erred in allowing police officer to testify as to a breathalyzer test because the officer complied with only part of this section; although the officer

advised defendant that he could have an additional test at his own expense and offered to assist him in obtaining one, it was undisputed that the officer failed to advise defendant that he would be reimbursed for the cost of the test if found not guilty. *Daniels v. State*, 84 Ark. App. 263, 139 S.W.3d 140 (2003).

Where defendant was arrested for driving while intoxicated, although the notice given to defendant by the officers regarding her right to have a different sobriety test was incomplete, defendant was notified that she could request a different type of test but failed to do so; thus, defendant was not permitted to exclude the results of her breathalyzer test. *Reynolds v. State*, 96 Ark. App. 360, 241 S.W.3d 765 (2006).

Trial court did not err in admitting the breathalyzer test results despite defendant's objection that he failed to receive his requested second test. The trooper substantially complied with the requirements of this section for providing reasonable assistance where he explained his standard practice was to advise the subject of his right to obtain a second test verbally and in writing, which was established with the introduction of the rights form signed by defendant, to explain that the cost of a second test was the subject's responsibility, and upon release from custody late at night to advise subjects that the second test would need to be administered at the local emergency room. *Briggs v. State*, 2015 Ark. App. 364, 465 S.W.3d 24 (2015).

### Appeals.

A challenge as to the compliance with this section was not considered on appeal where the appellate court held that any error arising from the admission of the test result was harmless in that there was other evidence presented forcefully suggesting that defendant was intoxicated. *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993).

### Burden of Proof.

When a defendant moves to exclude a test pursuant to subdivision (e)(2) (now (d)(3)) of this section, the state bears the burden of proving by a preponderance of the evidence that the defendant was advised of his right to have an additional test performed and that he was assisted in obtaining a test. *Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994).



In his appeal of a conviction for DWI, defendant successfully challenged the analysis of his urine, which allegedly tested positive for cannabinoids; because the chemical analysis was for an intoxicant other than alcohol and the state failed to meet its burden, under this section, that the test was done pursuant to required methods or by a certified individual, the trial court erred in finding the test to be admissible. *Tenner v. State*, 88 Ark. App. 123, 195 S.W.3d 383 (2004).

### **Compliance.**

In action for damages arising from automobile accident, it was error to admit record of blood sample taken from plaintiff's deceased, where plaintiff objected that the report did not indicate by whom the blood sample was taken, it appearing that a certain person did take the sample but that there was no evidence that this person was a physician or registered nurse. *Simolin v. Wilson*, 253 Ark. 545, 487 S.W.2d 603 (1972) (decision prior to 1975 amendment).

For cases discussing the prejudicial effect of failure to comply with Department of Health rules and regulations, see *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975); *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979); *Nicholas v. State*, 268 Ark. 541, 595 S.W.2d 237 (Ct. App. 1980).

In civil litigation, as well as in criminal cases, substantial compliance with §§ 5-65-202 — 5-65-205 and with the Health Department rules governing blood-alcohol tests, is all that is demanded to make such test results admissible. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975); *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988); *Goode v. State*, 303 Ark. 609, 798 S.W.2d 430 (1990).

Even certified operators may not ignore the Department of Health regulations on operation and maintenance of the chromatograph, if their testimony is to form the basis of a presumption of intoxication. *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979).

Evidence held sufficient to find that there was a sufficient degree of compliance with §§ 5-65-202 — 5-65-205 and the Department of Health's rules so that the test results were admissible. *St. Paul Ins.*

*Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985); *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Tests used to determine the alcohol content of blood must be carefully monitored to assure reliability; however, only substantial compliance with health department regulations is required. *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993).

Officer advice concerning defendant's right to an additional test by the person of his choice literally complied with this section, and the trial court's finding of reasonable assistance to obtain another test was not clearly against the preponderance of the evidence. *Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994).

Because the breathalyzer test was not illegally obtained, Ark. R. Crim. P. 16.2 did not apply, and as no argument was made that a conflict existed between the rules and this section, defendant's motion to prohibit the introduction of the breathalyzer test into evidence was not a motion to suppress and the trial court erred in admitting the breathalyzer results over the objection of defendant where the form used to advise defendant failed to meet the statutory requirements. *Mhoon v. State*, 369 Ark. 134, 251 S.W.3d 244 (2007).

Circuit court erred in allowing the results of defendant's blood-alcohol test into evidence because the state failed to provide evidence that the blood was drawn by a physician or a person acting under the direction and supervision of a physician as required by this section; there was no evidence that the medical center employee who drew defendant's blood was a registered nurse, otherwise qualified to withdraw blood, or performing his normal duties of withdrawing blood from a patient, and there was no evidence that the employee was acting under the supervision or direction of a physician at the time defendant's blood was drawn. *Bates v. State*, 2011 Ark. App. 446, 384 S.W.3d 654 (2011).

### **Evidence.**

Where, in prosecution for driving while intoxicated, the blood alcohol test was not ordered by a defendant or an officer of the law, but was ordered by an emergency



room physician for his own use in connection with his treatment of a patient, the question was not whether the test complied with the strict procedures of this section, but whether the test results were admissible under Evid. Rule 803(4). *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

The trial court did not err by admitting into evidence a breathalyzer log showing all tests performed on the machine for a period of five days, even though the defendant's blood alcohol content was the highest one recorded on it, where the log was admissible for the purpose of showing calibration of the machine and the defendant's test result, and the judge offered to admonish the jury to disregard the other test results or delete them, but the defendant rejected this offer. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

Evidence regarding procedure used to test defendant's blood alcohol held insufficient to allow introduction of test results into evidence. *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987).

Section 5-65-103 states that it is unlawful for a person to operate a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood. However, subsection (a) of this section states that percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

This section merely sets out conditions affecting the admissibility of the initial breathalyzer test. A question of admissibility is distinguishable from the suppression of evidence contemplated by Ark. R. Crim. P. 24.3(b). *Scalco v. State*, 42 Ark. App. 134, 856 S.W.2d 23 (1993).

A showing that a blood alcohol chemical analysis was made by a method approved by the Director of the State Board of Health and/or the Director of the Arkansas State Police, as required by this section, is part of the foundation to be laid for the introduction of the results of such tests or analysis and the burden is upon the state to establish it. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

Results of a blood alcohol chemical analysis test should not have been introduced into evidence without a showing that the procedures performed were in

compliance with the Arkansas State Department of Health regulations, as required under this section. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

Although § 5-65-206 does not require a machine operator's testimony, or his certificate, as a prerequisite to the introduction of chemical analysis test results, this section requires a blood sample to be collected in keeping with certain Board of Health methods in order for the test to be admissible in evidence. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

### **Jury Instructions.**

Trial court did not err in rejecting a DUI defendant's proffered jury instructions because the instructions' omission of any reference to chemical testing or chemical analysis failed to take into account § 5-65-103's incorporation of this section, which describes "the chemical analysis of a person's blood, urine, or breath." The model jury instruction represented a more accurate reflection of the law, although it did not address the 2001 amendment to § 5-65-103, which had eliminated the phrase "as determined by a chemical test." *Graham v. State*, 2012 Ark. App. 90, 389 S.W.3d 33 (2012).

### **Physician's Direction.**

A registered nurse taking a defendant's blood sample following standard hospital policy with a physician on call meets the requirements and purpose of subsection (d), requiring the sample be taken "under the direction and supervision of a physician." *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992).

### **Second Blood-Alcohol Test.**

There is no requirement in subsection (e) (now (d)) of this section that the results of the first blood alcohol test be furnished so that the person tested can decide whether to request a second test; moreover, subsection (e) (now (d)), as currently drafted, makes good common sense. Even without knowing the results of the first test, the person whose blood is examined may well want to have a second test performed immediately to assure the validity and accuracy of the testing procedures. *State v. Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994).

Police substantially complied with the requirement of § 5-65-204 that they assist defendant in obtaining an indepen-

dent blood alcohol test, by giving the uncooperative defendant a phone book and directing him to contact a local hospital upon his release from jail. *Lampkin v. State*, 81 Ark. App. 434, 105 S.W.3d 363 (2003).

This section required the arresting officer to advise defendant of his right to obtain a second independent blood test, and defendant did not dispute that this occurred, and to permit and assist defendant in obtaining it. The trial court did not clearly err in finding that the officer substantially complied with the statute. *Ebel v. State*, 2014 Ark. App. 588, 445 S.W.3d 553 (2014).

#### **Suppression of Evidence.**

A motion to exclude evidence of the breathalyzer test on grounds that the officer had failed to advise defendant of his right to an additional test and to assist him in obtaining such a test as required by this section is not a motion to suppress evidence under Ark. R. Crim. P. 16.2. *Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994).

Circuit court did not err in denying defendant's motion to suppress the evidence of his blood-alcohol test results because he had signed both the Miranda and

Arkansas Statements of Rights forms and agreed to submit to the blood-alcohol test and there was no conflict between Ark. R. Crim. P. 12.3(b) and subdivision (c)(1) of this section regarding the person(s) authorized to do blood testing where the Rule did not apply to blood tests obtained by consent. *Roe v. State*, 2015 Ark. App. 693, 477 S.W.3d 551 (2015).

#### **Waiver.**

The driver of the automobile cannot waive the requirements as to the method of withdrawing the blood and the method of testing, inasmuch as the requirements were placed in the statute to assure the public and the driver that they could rely upon the tests in connection with highway safety in general. *Newton v. Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979).

**Cited:** *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975); *Watson v. Friereson*, 272 Ark. 316, 613 S.W.2d 824 (1981); *Hughes v. State*, 17 Ark. App. 34, 705 S.W.2d 455 (1986); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Ballew v. State*, 305 Ark. 542, 809 S.W.2d 374 (1991); *King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993); *Scalco v. City of Russellville*, 318 Ark. 61, 883 S.W.2d 813 (1994); *Taylor v. State*, 2011 Ark. App. 215 (2011).

### **5-65-205. Refusal to submit to a chemical test.**

(a)(1) If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency as provided in § 5-65-202:

(A) A chemical test shall not be given;

(B) The person's motor vehicle operator's license, permit, or other evidence of driving privilege shall be seized by the law enforcement officer; and

(C) The law enforcement officer shall immediately deliver to the person from whom the motor vehicle operator's license, permit, or other evidence of driving privilege was seized a temporary driving permit under § 5-65-402.

(2) Refusal to submit to a chemical test under this subsection is a strict liability offense and is a violation.

(b)(1) The Office of Driver Services shall suspend or revoke the driving privilege of an arrested person who refuses to submit to a chemical test under this subchapter.

(2)(A) A person who refuses to submit to a chemical test of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol or controlled substance content of the person's blood or breath shall have his or her driving privileges:



(i) Suspended for one hundred eighty (180) days for a first offense;  
(ii) Suspended for two (2) years for a second offense occurring within five (5) years of the first offense;

(iii) Revoked for three (3) years for a third offense occurring within five (5) years of the first offense; and

(iv) Revoked for his or her lifetime for a fourth offense occurring within five (5) years of the first offense.

(B) The office may issue an ignition interlock restricted license under § 5-65-118 immediately, but only:

(i) To a person who is arrested for a first offense under this section; and

(ii) When the person is arrested for operating or being in actual physical control of a motor vehicle or motorboat while intoxicated by the ingestion of alcohol.

(C) The restricted driving permit provision of § 5-65-120 does not apply to a suspension for a first offense under this section.

(c) The office shall consider any of the following that occurred within the five (5) years immediately before the current offense a previous offense for the purposes of enhancing the administrative penalty under this section:

(1) A conviction for an offense of refusing to submit to a chemical test; and

(2) A suspension or revocation of driving privileges for an arrest for refusing to submit to a chemical test when the person was not subsequently acquitted of the criminal charge.

(d) The office shall deny the issuance of a license or permit to operate a motor vehicle to a person who is a resident and who violates this section but who does not have a license or permit to operate a motor vehicle, in addition to any other penalty under this section, for the following periods of time:

(1) Six (6) months for a first offense; and

(2) One (1) year for a second or subsequent offense.

**History.** Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 277, § 1; 1995, No. 802, §§ 4, 5; 1999, No. 1077, § 15; 2001, No. 1501, § 3; 2003, No. 1779, § 2; 2005, No. 1234, § 1; 2007, No. 712, § 2; 2009, No. 359, § 4; 2009, No. 633, § 4, 2009, No. 748, § 30; 2013, No. 361, §§ 7, 8; 2015, No. 299, § 9; 2015, No. 1155, § 12.

**A.C.R.C. Notes.** Pursuant to Acts 2015, No. 1155, § 17, the amendments to this section by Acts 2015, No. 1155, § 12, are superseded by the amendments to this

section by Acts 2015, No. 299, § 9.

**Publisher's Notes.** Acts 1995, No. 802, § 5(a), is also codified, in part, as § 5-65-120(c).

**Amendments.** The 2013 amendment inserted "saliva" in (b)(1)(A)(i) and (b)(2) through (b)(4); inserted "concentration" in (b)(2) through (b)(4); substituted "purpose" for "purposes" in (b)(2); and inserted "or breath" in (b)(3).

The 2015 amendment by No. 299 re-wrote the section.

The 2015 amendment by No. 1155 inserted "concentration" following "alcohol" in (b)(1)(A)(i).



## CASE NOTES

## ANALYSIS

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**Constitutionality.**

Admission into evidence of defendant's refusal to submit to a chemical test did not violate her Fifth Amendment right against self-incrimination. *Weaver v. City of Fort Smith*, 29 Ark. App. 129, 777 S.W.2d 867 (1989).

Former version of statute was not in violation of the due process or equal protection clauses. *Cook v. State*, 321 Ark. 641, 906 S.W.2d 681 (1995) (decision under prior law).

Defendant had no standing to challenge the validity of former implied consent provisions, since defendant was an Arkansas resident at the time of the offense, had not suffered injury as a result of this provision, nor did he belong to a class which was prejudiced by the law. *O'Neill v. State*, 322 Ark. 299, 908 S.W.2d 637 (1995) (decision under prior law).

Under Ark. R. Crim. P. 31.1 and 31.2 and Ark. Const., Art. 2, § 7, a defendant charged under former version of the implied consent law had the right to a jury trial, and to the extent that former statute prevented a defendant from having a jury determination, it was unconstitutional. *Medlock v. State*, 328 Ark. 229, 942 S.W.2d 861 (1997) (decision under prior law).

**Consciousness of Guilt.**

Evidence of the refusal to submit to a chemical test can properly be admitted as circumstantial evidence showing consciousness of guilt of a defendant charged with offense of driving while intoxicated, and once admitted, the weight of this evidence is a question to be resolved by the trier of fact, which may also consider the circumstances surrounding the re-

fusal and any explanation given for declining to take the test. *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990).

**Conviction.**

A defendant does not have to be convicted of DWI before he can be convicted of refusing to submit to a blood test. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992).

**Elements of Offense.**

A violation occurs when the police officer has reasonable cause to believe the operator or person in actual physical control is intoxicated, the police officer directs the operator to submit to a blood test, and the operator refuses to do so. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992).

**Intent.**

Since a conviction of refusal to submit to a chemical test can be based on any of three culpable mental states, this crime is a general intent crime for which voluntary intoxication is no defense. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985) (decision under prior law).

Specific intent is not a necessary element of this crime; the mens rea may be satisfied by proof that the accused acted recklessly or knowingly, as well as by proof that the accused acted purposely. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985) (decision under prior law).

**No Citation.**

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under § 5-65-206(a)(2), a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication. Based on the eyewitness testimony, defendant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations

regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in § 5-65-102, and (1) the jury could have discounted testimony by defendant's son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

### **Notice of Rights.**

Where defendant had refused to take an intoximeter test, the introduction of the refusal into evidence on the charge of driving while under the influence of intoxicants was not prejudicial even though defendant had not been advised that the arresting officer would have assisted him in securing an independent medical opinion. *Fletcher v. City of Newport*, 260 Ark. 476, 541 S.W.2d 681 (1976).

Where the evidence disclosed that the arresting officer did not advise the defendant driver that if he objected to the taking of his blood for a blood alcohol test, a breath or urine test might be taken at his own expense, did not mean that all testimony with regard to the test was inadmissible under the provisions of § 5-65-204; since the defendant did not have any test results introduced into evidence against him, he was not deprived of any statutory rights when the trial court permitted the arresting officer to testify that the defendant refused to submit to a blood alcohol test. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

If a *Miranda* warning is given in connection with an explanation of the implied consent law, the police officers must explicitly inform the suspect that the *Miranda* rights are not applicable to the decision of whether to take the test. *Wright v. State*, 288 Ark. 209, 703 S.W.2d 850 (1986).

The *Miranda* rights do not apply with respect to taking tests under the implied consent statute; for example, an accused does not have the right to contact an attorney before taking, or refusing to take, the test. *Wright v. State*, 288 Ark. 209, 703 S.W.2d 850 (1986).

### **Prior Convictions.**

During the penalty phase of defendant's trial for driving while intoxicated in violation of § 5-65-103 and refusal to submit to a chemical test in violation of this section, the trial court did not err by admitting evidence of his prior convictions for refusal to submit to a chemical test; the evidence was relevant to his sentencing as either character evidence or aggravating circumstances. *Williams v. State*, 2009 Ark. App. 554 (2009).

### **Reasonable Cause.**

Where defendant was stopped by police officers because of his driving and after the officers talked with defendant, defendant turned and shot officer and thereafter both officers and defendant were injured and taken to hospital and the treating physician ordered a blood test on defendant and such defendant was charged with assault with intent to kill, the provisions of §§ 5-65-202 — 5-65-205 with regard to the taking of a blood test had no application. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision prior to 1983 amendment).

Evidence held sufficient to find that there was ample cause for the officer to require defendant to submit to a breath test. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

Where defendant was not arrested for any act committed while driving while intoxicated, nor was he involved in a fatal accident or stopped by an officer who had reasonable cause to believe that he was intoxicated, defendant was not deemed to have consented to take the blood alcohol test even though he was found in physical control of a vehicle while intoxicated. *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985).

Since defendant's parked car created a traffic hazard, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger of injury to persons or property was being committed by the defendant; thus, the stop was reasonable under Ark. R. Crim. P. 3.1, and the evidence of driving while intoxicated was admissible. *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985).

### **Requests.**

Nothing in this section limits law-enforcement officers to one request; the offi-



cers complied with the statute when they did not force defendant to submit to a blood test when she refused, and one officer obtained a urine sample only after she agreed to a urine test, such that the giving of the urine samples did not violate the plain language of the statute. *Blackwell v. State*, 2015 Ark. App. 96, 455 S.W.3d 848 (2015).

#### **Search Warrant.**

In a driving while intoxicated case, a trial court did not err by denying a motion to suppress the results of a blood-alcohol test taken pursuant to a search warrant because the chemical test that may not be given under subsection (a) of this section after the accused refuses to submit to a

chemical test is limited to the warrantless test authorized by § 5-65-202. *Metzner v. State*, 2015 Ark. 222, 462 S.W.3d 650 (2015).

#### **Testing Options.**

Where the officer gave the motorist the option of submitting to either a urine or a blood test, the motorist could not properly refuse without penalty. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

**Cited:** *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998).

### **5-65-206. Evidence in prosecution — Presumptions.**

(a)(1) It is presumed at the trial of a person who is charged with a violation of § 5-65-103 that the person was not intoxicated if the alcohol concentration of the person's blood, urine, breath, or other bodily substance is four hundredths (0.04) or less by weight as shown by chemical analysis at the time of or within four (4) hours after the alleged offense.

(2) A presumption does not exist if at the time of the alleged offense the person has an alcohol concentration of more than four hundredths (0.04) but less than eight hundredths (0.08) by weight of alcohol in the defendant's blood, urine, breath, or other bodily substance, although this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(b) The provisions of subsection (a) of this section shall not limit the introduction of other relevant evidence offered to show whether or not the defendant was intoxicated.

(c) The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health.

(d)(1) Except as provided in subsection (e) of this section, a record or report of a certification, rule, evidence analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Department of Health under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure when duly attested to by the Director of the Office of Alcohol Testing of the Department of Health or his or her assistant, in the form of an original signature or by certification of a copy.

(2) An instrument performing the chemical analysis shall have been duly certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3)(A) A person charged with violating § 5-65-103 has the right to cross-examine or call as a witness:



- (i) The person who calibrates the instrument conducting a chemical analysis of the person’s bodily substances;
  - (ii) The operator of the instrument conducting a chemical analysis of the person’s bodily substances; or
  - (iii) A representative of the office.
- (B)(i) The prosecuting attorney or the defendant may compel the testimony of a person listed in subdivision (d)(3)(A) of this section by a subpoena issued to that person at least ten (10) days before the date of the hearing or trial.
- (ii) The person whose testimony is compelled shall have with him or her the record or report at issue, and the record or report is admissible at the hearing or trial.
- (e) The admissibility of a chemical analysis that determines the presence in a person’s blood, urine, breath, or other bodily substance of a controlled substance or other intoxicant that is not alcohol is governed by § 12-12-313 when that chemical analysis is performed by the State Crime Laboratory and when the chemical analysis is being used in a criminal prosecution under § 5-65-103, § 5-65-303, or § 5-10-105.

**History.** Acts 1957, No. 346, § 1; 1961, No. 215, § 1; 1969, No. 17, § 1; 1971, No. 578, § 1; 1983, No. 549, § 12; A.S.A. 1947, § 75-1031.1; Acts 1989, No. 928, § 1; 1999, No. 462, § 1; 2001, No. 561, §§ 11, 12; 2005, No. 886, § 2; 2007, No. 650, § 1; 2009, No. 748, § 31; 2015, No. 299, § 10.

**Amendments.** The 2015 amendment added “Presumptions” in the section heading; rewrote (a); in (b), substituted “of” for

“in” preceding “subsection”, substituted “limit” for “be construed as limiting”, deleted “any” preceding “other relevant”, and substituted “offered to show” for “bearing upon the question of”; deleted (d)(1)(B) and redesignated (d)(1)(A) as (d)(1); substituted “An” for “However, the” in (d)(2); redesignated and rewrote former (d)(3) and (d)(4) as (d)(3)(A) and (d)(3)(B); and rewrote (e).

RESEARCH REFERENCES

**ALR.** Admissibility and sufficiency of extrapolation evidence in DUI prosecutions. 119 A.L.R.5th 379.

**Ark. L. Rev.** Legislation — No. 215 — Weight to Be Given Evidence of Alcoholic Content of the Blood Changed, 15 Ark. L. Rev. 437.

A Decade of Development in the Law of Criminal Procedure in Arkansas, 22 Ark. L. Rev. 669.

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

CASE NOTES

ANALYSIS	
In General.	—Portable Breath Test.
Construction.	—Refusal to Take Chemical Test.
Applicability.	Method of Analysis.
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—In General.	<b>In General.</b>
	This section is not a criminal statute but rather a statute relating to admission

of evidence in criminal prosecutions. *Wilson v. Coston*, 239 Ark. 515, 390 S.W.2d 445 (1965).

### **Construction.**

The "person calibrating the machine" is the person testing the accuracy of the machine's measurements as outlined in the regulations, or the senior operator. *Peters v. State*, 321 Ark. 276, 902 S.W.2d 757 (1995).

### **Applicability.**

It was error to apply this section to a civil proceeding for personal injuries arising out of automobile accident. *Wilson v. Coston*, 239 Ark. 515, 390 S.W.2d 445 (1965); but see *Judy v. McDaniel*, 247 Ark. 409, 445 S.W.2d 722 (1969); *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981).

### **Certificate.**

This section does not require the state to produce in court the Arkansas Department of Health official who certifies the breathalyzer machine; it allows certification to be proven with the certificate itself. *Wells v. State*, 285 Ark. 9, 684 S.W.2d 248 (1985).

This section does not require proof of an installation certificate before test results may be admitted into evidence. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986).

Subsections (c) and (d) of this section require that (1) the method of testing must be approved by the Board of Health, (2) the machine must have been certified in the three months preceding arrest, and (3) the operator must have been trained and certified. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986).

### **Cross-Examination of Operator.**

While subsection (d) does not require the State to introduce an installation certificate or a senior operator's testimony as a prerequisite to the introduction of chemical analysis test results, it does provide that the person who calibrates the machine and the person who operates it will be made available for cross-examination by the defense upon reasonable notice to the prosecutor. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986); *Smith v. State*, 301 Ark. 569, 785 S.W.2d 465 (1990).

If defendant had desired to cross-examine senior operator, he had the burden of

notifying the prosecutor to make the operator available; he therefore could not complain of the State's failure to produce the senior operator or his certificate. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986).

Admission of breathalyzer results was error where, prior to trial the defendant indicated that he wished to cross-examine all persons responsible for the calibration and certification of the breathalyzer, but the state failed to make such persons available at trial; further, such error was prejudicial, notwithstanding that the jury might have convicted the defendant of operating a motor vehicle while intoxicated based on the testimony of the arresting officer that the defendant had an odor of alcohol about him and failed two field-sobriety tests, without considering the improperly admitted testimony concerning the defendant's blood-alcohol content. *White v. State*, 73 Ark. App. 264, 42 S.W.3d 584 (2001).

It was not a violation of subdivision (d)(1) of this section to admit certificates of the calibration of a breathalyzer machine and of the qualifications of the machine's operator, without the testimony of the authors of those certificates, because the statute had been amended to remove a prior requirement that the State provide such witnesses upon receiving notice from a defendant. *Chambers v. State*, 2012 Ark. 407, 424 S.W.3d 296 (2012).

In defendant's trial for driving while intoxicated, it was not improper to place the burden on defendant, under this section, to subpoena the authors of certificates that the breathalyzer machine used in defendant's case had been properly calibrated and that the operator of the machine was qualified, if defendant wished to cross-examine the authors; the certificates were not testimonial evidence, so the State had no duty to bring the authors into court. *Chambers v. State*, 2012 Ark. 407, 424 S.W.3d 296 (2012).

### **Due Process.**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not require that law enforcement agencies preserve breath samples in order to introduce breath analysis tests at trial. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).



## Evidence.

### —In General.

Examination of investigating police officer relative to intoximeter test and amount of alcohol allegedly consumed by defendant was not error where defendant himself testified that he had consumed a certain quantity of alcohol and cross-examination of investigating officer elicited testimony that officer did not arrest defendant but would have if the meter reading had been high enough. *Judy v. McDaniel*, 247 Ark. 409, 445 S.W.2d 722 (1969).

Where there was testimony of witnesses that defendant acted drunk while in liquor store and further testimony of policeman that defendant was in wrong lane of traffic and weight of alcohol in defendant's blood was above amount for statutory presumption of intoxication it was not improper to overrule a motion for a directed verdict of acquittal. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

Expert testimony explaining the meaning of blood alcohol content is not required to prove intoxication. In fact, one may be convicted of driving while intoxicated without the use of a blood alcohol test. *Sparks v. State*, 25 Ark. App. 190, 756 S.W.2d 911 (1988).

Trial judge did not abuse his discretion in acquitting defendant where officer revealed that he did not know for certain what simulator he was using because the device used had lost its label, and was unable to testify that device had in fact been approved by the health department. *State v. Massery*, 302 Ark. 447, 790 S.W.2d 175 (1990).

State met proof required under Department of Health Regulation for Alcohol Blood Testing, § 3.20. *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992).

Although this section does not require a machine operator's testimony, or his certificate, as a prerequisite to the introduction of chemical analysis test results, § 5-65-204 requires a blood sample to be collected in keeping with certain Board of Health methods in order for the test to be admissible in evidence. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

The crime of DWI is committed whether the act is violated by a motorist who is intoxicated or by a motorist whose blood alcohol level is in excess of the legal limit; these two conditions are two different

ways of proving a single violation, and proof by chemical test that the motorist's blood alcohol content was in excess of the legal limit is admissible as evidence tending to prove intoxication. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

Defendant was not entitled to a presumption that he was not intoxicated based on the test that showed his blood-alcohol content to be 0.05%; defendant failed to take into account the blood test that was drawn some 30 minutes after the wreck, which showed a blood-alcohol content of 0.0904 percent, and the trooper's testimony that defendant had been given fluids prior to the time that the second blood sample was drawn. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

Where a breath test performed within two hours of a traffic stop showed that defendant's blood alcohol level was more than 0.08, defendant's claim that his alcohol level would have still been rising at the time of the offense and could have been peaking at the time of the tests was unsupported by the evidence. The test results, along with evidence that he smelled of alcohol, crossed the center line, and failed sobriety tests was sufficient to support his conviction of driving while intoxicated pursuant to § 5-65-103(a) (now (a)(1)). *Hayden v. State*, 103 Ark. App. 32, 286 S.W.3d 177 (2008).

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under subdivision (a)(2) of this section, a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication. Based on the eyewitness testimony, defendant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in § 5-65-102, and (1) the jury could have discounted testimony by defendant's son that he was



driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. *Blair v. State*, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

#### —Portable Breath Test.

The portable breath test is not one certified by the Department of Health and is therefore not admissible under this section. *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988).

The results of a portable breath test, or what is sometimes called a roadside sobriety test, which are not admissible to prove a person is guilty of driving while intoxicated, are admissible when they would indicate a person is not guilty where the evidence is exculpatory, is crucial to the defense, and is sufficiently reliable to warrant admission. *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988).

Since portable breathalyzer tests have not been certified by the Department of Health, admitting the evidence of the portable breathalyzer test was erroneous; however, the error was harmless. *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995).

Trial court erred in allowing the state to introduce evidence that defendant failed a portable breath test since the portable breathalyzer test had not been certified by the Arkansas Department of Health; a chemical analysis that has not been certified by the Department of Health is not admissible as evidence of driving while intoxicated under this section. *Daniels v. State*, 84 Ark. App. 263, 139 S.W.3d 140 (2003).

#### —Refusal to Take Chemical Test.

Evidence of the refusal to submit to a chemical test can properly be admitted as circumstantial evidence showing consciousness of guilt of a defendant charged with offense of driving while intoxicated, and once admitted, the weight of this evidence is a question to be resolved by the trier of fact, which may also consider the circumstances surrounding the refusal and any explanation given for declining to take the test. *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990).

#### Method of Analysis.

##### —In General.

It was error to admit testimony as to a urine analysis where there was no evidence analysis had been made according to a method approved by director of State Board of Health or Director of State Police. *Jones v. Forrest City*, 239 Ark. 211, 388 S.W.2d 386 (1965).

Trial court did not abuse its discretion in admitting results of breathalyzer test over objections of defendant that state failed to show officer who administered test was competent operator of the machine where officer briefly outlined operation of the machine, said that he had been to school to learn to operate it and that he had been operating it as part of his duties for a period of time. *Smith v. State*, 243 Ark. 12, 418 S.W.2d 627 (1967).

Where intoximeter was certified during period in which test of driver was made and there was a certified machine operator present at such test although he did not conduct the test, there was sufficient foundation for test findings under this section to admit them into evidence in action for property damages and personal injury. *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981).

Intoxilyzer satisfies the statutory requirement of being a "chemical analysis." *Dollar v. State*, 287 Ark. 153, 697 S.W.2d 93 (1985).

##### —Compliance with Rules.

Where there was evidence that there was substantial compliance with Department of Health rules in the taking of a blood test to determine alcoholic content such evidence was admissible. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

Even certified operators may not ignore the Department of Health regulations on operation and maintenance of the chromatograph, if their testimony is to form the basis of a presumption of intoxication. *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979).

Failure to calibrate machine as required by Department of Health regulation held not to be substantial compliance with the rule, and the failure to abide by the regulation was prejudicial to the defendant. *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979).

Where the defendant was collectively observed by officers for 30 minutes prior to administering of breath test, fact that he was not observed for 20 minutes by the operator of machine as required by Department of Health standards was of no consequence since substantial compliance with health department regulations is all that is required. *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

#### —Time.

Although Department of Health rules required that the sample of blood to determine intoxication be collected within two hours [now four hours] of an alleged offense and the testimony showed that the blood was drawn more than three hours thereafter, where it was also shown that the longer one waits to run the blood test, the more the percentage of alcohol decreases, no prejudicial error was demonstrated. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

This section does not provide an unqualified exclusionary rule of evidence for tests administered more than two hours after a person is arrested for driving while intoxicated but does provide for a presumption where the test is administered within two hours [now four hours] of arrest and the blood alcohol content is within a certain percentage. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

This section is silent regarding situations in which breath test is taken two hours [now four hours] or more after the arrest, and the result reflects a blood alcohol content of 0.10% or more, for a delay beyond two hours could result in the blood alcohol content of an intoxicated person declining to the extent that it could no longer be detected by the testing

mechanism, or, if detected it would register a smaller level and in such cases it would not be fair to apply either of the statutory provisions on presumptions. However, if the delay is two hours or longer and the test still shows a blood alcohol content of 0.10% or more, neither provision on presumptions is applicable, and the test is admissible. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

#### Notice.

Under former version of subsection (d) of this section, a new notice must be given following an appeal to circuit court and without such notice being filed the state is under no duty to produce the witness. *Bussey v. State*, 315 Ark. 292, 867 S.W.2d 433 (1993).

**Cited:** *Ayers v. State*, 247 Ark. 174, 444 S.W.2d 695 (1969); *Holloway v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976); *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Nicholas v. State*, 268 Ark. 541, 595 S.W.2d 237 (Ct. App. 1980); *Rasmussen v. State*, 277 Ark. 238, 641 S.W.2d 699 (1982); *Johnson v. State*, 6 Ark. App. 342, 642 S.W.2d 324 (1982); *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983); *Spicer v. City of Fayetteville*, 284 Ark. 315, 681 S.W.2d 369 (1984); *Southwest Pipe & Supply v. Hoover*, 13 Ark. App. 144, 680 S.W.2d 723 (1984); *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985); *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985); *Hughes v. State*, 17 Ark. App. 34, 702 S.W.2d 817 (1986); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Ballew v. State*, 305 Ark. 542, 809 S.W.2d 374 (1991); *Greer v. State*, 310 Ark. 522, 837 S.W.2d 884 (1992); *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996); *Smith v. State*, 55 Ark. App. 97, 931 S.W.2d 792 (1996).

### 5-65-207. Alcohol testing devices.

(a)(1) An instrument used to determine the alcohol content of the breath for the purpose of determining if the person was operating a motorboat on the waters of this state or a motor vehicle while intoxicated or with an alcohol concentration of eight hundredths (0.08) or more shall be constructed so that the analysis:

(A) Is made automatically when a sample of the person's breath is placed in the instrument; and

(B) Does not require adjustment or other action by the person administering the analysis.



(2) The instrument shall display digitally the alcohol content on the instrument itself as well as on an automatic printout.

(b) A breath analysis made by or through the use of an instrument that does not conform to the requirements of this section is inadmissible in a criminal or civil proceeding.

(c)(1) The State Board of Health may adopt appropriate rules to carry out the intent of this section.

(2) Only instruments approved by the board as meeting the requirements of this section and its own rules shall be used for making the breath analysis for determining alcohol concentration.

(3)(A) The Department of Health may limit by its rules the types or models of testing devices that may be approved for use under this section.

(B) The approved types or models shall be specified by manufacturer's name and model.

(d) A law enforcement agency that conducts alcohol testing shall comply with this section.

**History.** Acts 1985, No. 533, §§ 1-3; A.S.A. 1947, §§ 75-1046.1 — 75-1046.3; Acts 1989, No. 419, § 1; 2001, No. 561, § 13; 2007, No. 827, § 81; 2015, No. 299, § 11.

**Amendments.** The 2015 amendment, in (a)(1), inserted “motorboat on the waters of this state or a”, substituted “con-

structed so” for “so constructed”, and inserted the (a)(1)(A) and (a)(1)(B) designations; substituted “Does not require” for “without any” in (a)(1)(B); rewrote (a)(2) and (c); substituted “comply” for “maintain full compliance” in (d); and made stylistic changes.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General As-

sembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

## CASE NOTES

### Full Compliance.

The legislature intended to provide a time lag between the effective date of the act (June 28, 1985) enacting this section and full compliance. Hence, introduction of breathalyzer test into evidence was proper even though machine did not have the visual digital readout required by this

section, since full compliance with this section by all law enforcement agencies which conduct blood alcohol testing is not required until June 28, 1989. *Cothran v. State*, 291 Ark. 401, 725 S.W.2d 548 (1987).

**Cited:** *City of Little Rock v. Hudson*, 366 Ark. 415, 236 S.W.3d 509 (2006).

## 5-65-208. Motor vehicle and motorboat accidents — Testing required.

(a) When the driver of a motor vehicle or operator of a motorboat on the waters of this state is involved in an accident resulting in loss of human life or when there is reason to believe death may result, a chemical test of the driver's or operator's blood, breath, saliva, or urine shall be administered to the driver or operator, even if he or she is fatally injured, to determine the presence of and percentage of alcohol



concentration or the presence of a controlled substance, or both, in the driver's or operator's body.

(b)(1) A chemical test under this section shall be ordered as soon as practicable by one (1) of the following persons or agencies:

- (A) The law enforcement agency investigating the accident;
- (B) The physician in attendance; or
- (C) Other person designated by state law.

(2)(A) The person who conducts the chemical test of the driver's or operator's blood, breath, saliva, or urine under this section shall forward the results of the chemical test to the Department of Arkansas State Police, and the department shall establish and maintain the results of the chemical tests required by subsection (a) of this section in a database.

(B) The information in the database shall reflect the number of fatal motor vehicle accidents in which:

(i) Alcohol was found to be a factor, including the percentage of alcohol concentration involved;

(ii) Controlled substances were found to be a factor, including a list of the controlled substances found, the specific class of the controlled substance, and the amount; and

(iii) Both alcohol and a controlled substance were found to be factors, including the percentage of alcohol concentration involved, as well as a list of the controlled substances found and the amount.

(c) The result of a chemical test required by this section shall be reported to the department and may be used by state and local officials for:

(1) Statistical purposes that do not reveal the identity of the deceased person; or

(2) Any law enforcement purpose, including prosecution for the violation of any law.

**History.** Acts 1995, No. 711, § 2; 1995, No. 1105, § 2; 2003, No. 950, § 1; 2009, No. 423, § 1; 2011, No. 1120, § 13; 2013, No. 361, § 9; 2015, No. 299, § 12.

**Amendments.** The 2011 amendment substituted "an accident described in subsection (a) of this section" for "the collision" in (b)(1).

The 2013 amendment deleted designation (a)(1); substituted "controlled substances" for "drugs" in (a), twice in (b)(2)(B)(ii), and twice in (b)(2)(B)(iii); in (a), inserted "saliva" and substituted "alcohol concentration" for "concentration of alcohol"; substituted "chemical tests" for "analyses" in (b)(2)(A) and (c); and, in (b)(2)(A), substituted "person who conducts" for "medical personnel who conducted" and inserted "saliva".

The 2015 amendment inserted "or operator of a motorboat on the waters of this state" in (a), inserted references to "operator" throughout the section, and inserted "and motorboat" in the section heading; in (a), deleted "in addition to a penalty established elsewhere under state law" following "may result" and inserted "he or she is"; rewrote (b)(1); in (b)(2)(A), deleted "under subsection (a) of this section" preceding "of the driver's" and inserted "under this section"; substituted "including" for "with" in (b)(2)(B)(i); rewrote (b)(2)(B)(ii) and (b)(2)(B)(iii); and, in (c), substituted "The result of a chemical test" for "The results of the chemical tests" and inserted the (c)(1) and (c)(2) designations.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Driving While In-

toxicated, 26 U. Ark. Little Rock L. Rev. 367.

## CASE NOTES

## ANALYSIS

Advisement.

Suppression Denied.

**Advisement.**

Law enforcement is not required to advise a defendant of his right to refuse consent because a test is mandatory under this section. *Hinson v. State*, 2016 Ark. App. 166 (2016).

**Suppression Denied.**

In a negligent homicide case, there was no error in denying a motion to suppress because an officer complied with this section in requesting defendant to provide a blood sample during an investigation of a fatal accident; there was no violation of the search and seizure provisions under the United States Constitution because defendant consented. *Hinson v. State*, 2016 Ark. App. 166 (2016).

### SUBCHAPTER 3 — UNDERAGE DRIVING OR BOATING UNDER THE INFLUENCE LAW

## SECTION.

5-65-301. Title.

5-65-302. [Repealed.]

5-65-303. Driving or boating under the influence while underage.

5-65-304. Seizure, suspension, and revocation of license — Temporary permits.

5-65-305. Fines.

5-65-306. Public service work.

## SECTION.

5-65-307. Alcohol and driving education program.

5-65-308. No probation prior to adjudication of guilt — Records.

5-65-309. Implied consent.

5-65-310. Refusal to submit to a chemical test.

5-65-311. Relationship to other laws.

**Publisher's Notes.** Acts 2015, No. 299, § 13 inserted "or Boating" in the subchapter heading.

**Effective Dates.** Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is declared to exist and this act being neces-

sary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 2003, No. 1462, § 4: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that if the fees that are raised by this bill do not become effective by July 1, 2003, there will be a shortfall in the funding needed to maintain the alcoholism education programs; that these programs are mandated by law for those individuals that have their license suspended or revoked following an arrest for driving while intoxicated; and that these programs provide educational instruction and are necessary to protect the public health and welfare. Therefore, an emergency is declared to exist and this act being necessary for the preservation of

the public peace, health, and safety shall become effective on July 1, 2003.”

Acts 2005, No. 1992, § 6: Apr. 11, 2005. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that currently there exists some confusion as to whether the fees collected for the reinstatement of a suspended or revoked driver’s license should be collected for each offense or for each reinstatement; that due to the confusion, state agencies have not been allowed to collect the revenue that they anticipated for reinstatement fees which is causing a negative fiscal impact; and that this act is immediately necessary to clarify the law to prevent the impairment of agency operations due to a loss of anticipated revenue. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2015 (1st Ex. Sess.), No. 6, § 7: May 29, 2015 and July 22, 2015. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the Supreme Court of Arkansas held in *Leeka v. State*, 2015 Ark. 183 (2015), that in order to sustain a conviction for driving while intoxicated, the state must prove that the defendant had a reckless mental state despite the statute not expressly requiring that the defendant’s mental state be proven; that the General Assembly intended and still intends to keep driving while intoxicated a strict liability offense requiring no culpable mental state; that

the General Assembly passed and the Governor signed Act No. 299 during the 2015 Regular Session which amended § 5-65-103 by combining the offenses of driving while intoxicated and boating while intoxicated; that Act 299 also amended § 5-65-303 by combining the offenses of underage driving under the influence and underage boating under the influence; that Act No. 299 does not become effective until July 22, 2015; that the new offenses of driving and boating while intoxicated and driving or boating under the influence while underage are strict liability offenses requiring no culpable mental state; that Sections 2, 3, and 5 of this act are necessary because the offenses of driving while intoxicated and underage driving under the influence should not have an applicable culpable mental state as they are strict liability offenses; and that Sections 4 and 6 of this act are necessary because the offenses of driving or boating while intoxicated and underage driving or boating under the influence should not have an applicable culpable mental state as they are strict liability offenses. Therefore, an emergency is declared to exist, and:

“(1) Sections 2, 3, and 5 of this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

“(A) The date of its approval by the Governor;

“(B) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

“(C) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto; and

“(2) Sections 4 and 6 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 22, 2015.”

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### 5-65-301. Title.

This subchapter may be known and cited as the “Underage Driving or Boating Under the Influence Law” or the “Underage DUI or BUI Law”.

**History.** Acts 1993, No. 863, § 1; 2015, No. 299, § 13.

**Amendments.** The 2015 amendment inserted “or Boating” and “or BUI”.



## CASE NOTES

**Cited:** *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

**5-65-302. [Repealed.]**

**Publisher's Notes.** This section, concerning definitions for the Underage Driving Under the Influence Law, was repealed by Acts 2015, No. 299, § 13. This

section was derived from Acts 1993, No. 863, § 2.

For current law, see § 5-65-102.

**5-65-303. Driving or boating under the influence while underage.**

(a) A person commits the offense of driving or boating under the influence while underage if he or she is underage and operates or is in actual physical control of a motorboat on the waters of this state or a motor vehicle while:

(1) Under the influence of an alcoholic beverage or similar intoxicant; or

(2) At that time there was an alcohol concentration of two hundredths (0.02) but less than eight hundredths (0.08) in his or her breath, blood, urine, or saliva as determined by a chemical test.

(b) A violation of this section is an unclassified misdemeanor with penalties as prescribed by this subchapter.

(c) An alcohol-related offense under this section is a strict liability offense.

**History.** Acts 1993, No. 863, § 3; 2001, No. 561, § 14; 2015, No. 299, § 13; 2015 (1st Ex. Sess.), No. 6, §§ 5, 6.

**A.C.R.C. Notes.** Acts 2015 (1st Ex. Sess.), No. 6, § 1, provided: "Legislative intent.

"(a) It is the intent of the General Assembly with this act to address the Supreme Court's holding in *Leeka v. State*, 2015 Ark. 183 (2015), that the state must prove a culpable mental state in a prosecution for driving while intoxicated.

"(b) The General Assembly intends for this act to establish that the current offenses of driving while intoxicated and underage driving under the influence, as

well as the offenses of driving or boating while intoxicated and driving or boating under the influence while underage that were created by Acts 2015, No. 299, § 6, be strict liability offenses, which are offenses that require no culpable mental state be proven."

**Publisher's Notes.** Acts 2015 (1st Ex. Sess.), No. 6, § 6 specifically amended this section as amended by Acts 2015, No. 299.

**Amendments.** The 2015 amendment by No. 299 rewrote the section.

The 2015 (1st Ex. Sess.) amendment by No. 6 added (c).

## RESEARCH REFERENCES

**ALR.** Validity, construction, and operation of school "zero tolerance" policies towards drugs, alcohol, or violence. 117 A.L.R.5th 459.

Validity, Construction, and Application of State "Zero Tolerance" Laws Relating to

Underage Drinking and Driving. 34 A.L.R.6th 623.

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

## CASE NOTES

## ANALYSIS

Evidence.

Indictment or Information.

Lesser-Included Offenses.

Search and Seizure.

Sentencing.

**Evidence.**

Where defendant was driving erratically, the police officer detected an odor of alcoholic beverages in defendant's car, defendant failed at least one field sobriety test and tested at 0.07% blood/alcohol a little more than an hour after his arrest, and there was no opportunity for him to consume alcoholic beverages between time of arrest and time of testing, the total circumstances were enough to support a judgment of conviction for driving a car while under the influence of an alcoholic beverage. *Drummond v. State*, 320 Ark. 385, 897 S.W.2d 553 (1995).

**Indictment or Information.**

Municipal court erred and prejudiced defendant charged with driving while intoxicated (DWI) when it changed the charge to driving under the influence (DUI) on its own motion, because DUI is not a lesser-included offense of DWI and altering the charge violated § 5-65-107; and the circuit court erred in trying and convicting defendant of DUI following his appeal from the municipal court, a judgment it was not authorized to render under § 16-19-1105. *McElhanon v. State*,

329 Ark. 261, 948 S.W.2d 89 (1997), overruled in part, *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

**Lesser-Included Offenses.**

Driving under the influence (DUI) is not a lesser-included offense of driving while intoxicated, in that DUI requires an additional element of proof of the defendant's age and a different level of intoxication. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997), overruled in part, *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

**Search and Seizure.**

When defendant was arrested for suspicion of underage driving under the influence in violation of this section, the deputy's actions in transporting defendant to a nearby county outside his jurisdiction to administer a breathalyzer test were lawful under the Fourth Amendment because the test had to be given without delay due to the exigent circumstance of defendant's falling blood alcohol content and in accordance with Health Department regulations. *Pickering v. State*, 2012 Ark. 280, 412 S.W.3d 143 (2012).

**Sentencing.**

Jail sentence for violating this section was illegal on its face because the trial court lacked authority to impose it. *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

**Cited:** *State v. Roberts*, 321 Ark. 31, 900 S.W.2d 175 (1995).

**5-65-304. Seizure, suspension, and revocation of license — Temporary permits.**

(a) At the time of arrest for violating § 5-65-303, the arresting law enforcement officer shall seize the underage person's motor vehicle operator's license, permit, or other evidence of driving privilege and issue to the underage person a temporary driving permit as provided by § 5-65-402.

(b)(1) As provided by § 5-65-402, the Office of Driver Services shall:

(A) Suspend or revoke the driving privileges of the arrested underage person; and

(B) Provide the arrested underage person the right to hearing and judicial review.

(2) The office shall suspend or revoke the underage person's driving privilege for violating § 5-65-303 as follows:

(A) Suspend the driving privilege for ninety (90) days for a first offense;

(B) Suspend the driving privilege for one (1) year for a second offense occurring while the person is underage; and

(C)(i) Revoke the driving privilege for a third or subsequent offense occurring while the person is underage.

(ii) A revocation issued under this subdivision (b)(2)(C) continues until the underage person reaches twenty-one (21) years of age or for a period of three (3) years, whichever is longer.

(c) Either of the following are considered a previous offense by the office under this section:

(1) A conviction for violating § 5-65-103 or § 5-65-303; and

(2) A suspension or revocation of driving privileges for an arrest for a violation of § 5-65-103 or § 5-65-303 when the person was not subsequently acquitted of the criminal charge.

(d)(1)(A) A driving privilege that is suspended under this section may be reinstated by the office upon payment of a fee of twenty-five dollars (\$25.00) for each occurrence of an offense that resulted in an order of administrative suspension under § 5-65-303.

(B) As used in this subsection, "occurrence" means each separate calendar date when an offense or offenses take place.

(2) The fee under this subsection is not required when an administrative suspension order has been removed because:

(A) The person has been found not guilty of the offense by a circuit court or district court; or

(B) A de novo review of the administrative suspension order by the office resulted in the removal.

(3) Forty percent (40%) of the revenues derived from the fee under this subsection shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Blood Alcohol Program of the Department of Health.

(4) The fee under this subsection is supplemental to and in addition to any fee imposed under § 5-65-119, § 5-65-310, § 27-16-508, or § 27-16-808.

**History.** Acts 1993, No. 863, § 4; 1999, No. 1077, § 16; 2005, No. 1992, § 2; 2007, No. 712, § 3; 2015, No. 299, § 13.

**Amendments.** The 2015 amendment rewrote the section.

## CASE NOTES

**Cited:** *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

### 5-65-305. Fines.

(a) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-303 or § 5-65-310 shall be fined:

(1) Not less than one hundred dollars (\$100) and not more than five hundred dollars (\$500) for a first offense;



(2) Not less than two hundred dollars (\$200) and not more than one thousand dollars (\$1,000) for a second offense; and

(3) Not less than five hundred dollars (\$500) and not more than two thousand dollars (\$2,000) for a third or subsequent offense.

(b)(1) For the purpose of determining a person’s fine under this section, a conviction or suspension for violating § 5-65-103 or § 5-65-205 may be considered a previous offense.

(2) However, a conviction or suspension for § 5-65-103 or § 5-65-205 is considered only one (1) previous offense if the conviction or suspension arose out of the same criminal offense.

**History.** Acts 1993, No. 863, § 5; 1999, No. 1077, § 17; 2015, No. 299, § 13.

**Amendments.** The 2015 amendment, in (a), substituted “A person” for “Any person”, substituted “Not less” for “No

less” and “a” for “the” in (a)(1) through (a)(3), and deleted “occurring underage” at the end of (a)(2) and (a)(3); rewrote and redesignated former (b) as (b)(1); and added (b)(2).

CASE NOTES

**Cited:** Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-306. Public service work.

(a) A person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-303 or § 5-65-310 shall be ordered by the court to perform public service work at the discretion of the court.

(b) The period of public service work shall be for not less than:

(1) Thirty (30) days for a second offense of violating § 5-65-303; and

(2) Sixty (60) days for a third or subsequent offense of violating § 5-65-303.

**History.** Acts 1993, No. 863, § 6; 1999, No. 1077, § 18; 2015, No. 299, § 13.

**Amendments.** The 2015 amendment, in (a), substituted “A” for “Any underage” and “at the discretion of” for “of the type and for the duration as deemed appropri-

ate by”; substituted “public service work shall be for not less than” for “community service shall be for” in (b); substituted “Thirty” for “No less than thirty” in (b)(1); and substituted “Sixty” for “No less than sixty” in (b)(2).

CASE NOTES

Constitutionality.

The appellate court did not consider the constitutionality of the public service penalty in this section because the appellate court will not strike down a legislative act on constitutional grounds without first

having the benefit of a fully developed adversary case. Drummond v. State, 320 Ark. 385, 897 S.W.2d 553 (1995).

**Cited:** Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-307. Alcohol and driving education program.

(a)(1)(A) A person who has his or her driving privileges suspended, revoked, or denied for violating § 3-3-203, § 5-65-310, or § 5-65-303 is required to complete an alcohol and driving education program for

underage drivers as prescribed and approved by the Division of Behavioral Health Services or an alcoholism treatment program licensed by the division, or both, in addition to any other penalty provided in this chapter.

(B) A person who subsequently violates § 3-3-203 or § 5-65-303 while his or her driving privileges are suspended or revoked for violating § 3-3-203 or § 5-65-303 is also required to complete an approved alcohol and driving education program or alcoholism treatment program for each additional violation.

(2) The division shall approve only those programs in alcohol and driving education that are targeted at the underage driving group and are intended to intervene and prevent repeat occurrences of driving under the influence or driving while intoxicated.

(3)(A)(i) The alcohol and driving education program may collect a program fee of up to one hundred twenty-five dollars (\$125) per enrollee to offset program costs.

(ii) A person ordered to complete an alcohol and driving education program or an alcoholism treatment program under this section may be required to pay a fee of up to twenty-five dollars (\$25.00) to offset the additional costs associated with reporting requirements under this subchapter in addition to the costs collected for the program.

(B) An approved alcohol and driving education program shall report monthly to the division all revenue derived from these fees.

(b) The person shall furnish proof of attendance at and completion of the alcohol and driving education program or alcoholism treatment program required under subdivision (a)(1) of this section prior to reinstatement of his or her driving privilege.

(c) The division may promulgate rules reasonably necessary to carry out the purposes of this section regarding the approval and monitoring of the alcohol and driving education programs.

(d)(1)(A) A person whose driving privilege is suspended or revoked for violating § 5-65-303 or § 5-65-310 shall:

(i) Both:

(a) Furnish proof of attendance at and completion of the alcohol and driving education program or alcoholism treatment program required under subdivision (a)(1) of this section and at a victim impact panel as provided in § 5-65-121 before reinstatement of his or her suspended or revoked driving privilege; and

(b) Pay any fee for reinstatement required under § 5-65-119, § 5-65-304, or § 5-65-121; or

(ii) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(B) An application for reinstatement shall be made to the Office of Driver Services.

(2) Even if a person has filed a de novo petition for review under § 5-65-402, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(3)(A) A person whose driving privilege is suspended under this subchapter may enroll in an alcohol education program prior to disposition of the offense by the circuit court or district court but is not entitled to a refund of fees paid if the charges are dismissed or if the person is acquitted of the charges.

(B) A person who enrolls in an alcohol education program is not entitled to any refund of fees paid if the person is subsequently acquitted.

(e) An alcohol and driving education program required by this section shall remit the fees imposed under this section to the division.

**History.** Acts 1993, No. 863, § 7; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1999, No. 1077, § 19; 2003, No. 1462, § 3; 2005, No. 1768, § 4; 2007, No. 251, § 3; 2009, No. 946, § 2; 2013, No. 1107, §§ 7, 8; 2015, No. 299, § 13.

**Amendments.** The 2013 amendment substituted “Division of Behavioral Health Services” for “Office of Alcohol and Drug Abuse Prevention” throughout the section.

The 2015 amendment rewrote (a)(1)(B); in (a)(3)(A)(ii), substituted “A person” for “An underage person”, deleted “in addition to the costs collected for the program” preceding “a fee”, and added “in addition

to the costs collected for the program” at the end; in (b), substituted “The person” for “Prior to reinstatement of a driver’s license suspended or revoked under this subchapter, the driver” and added “prior to reinstatement of his or her driving privilege” at the end; substituted “driving privilege” for “license” in the introductory language of (d)(1)(A) and for “driver’s license” in (d)(1)(A)(i)(a); in (d)(3)(A), inserted “whose driving privilege is” and substituted “circuit court or district court” for “circuit court, district court, or city court”; inserted “required by this section” in (e); and made stylistic changes.

## CASE NOTES

**Cited:** *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

### 5-65-308. No probation prior to adjudication of guilt — Records.

(a) A circuit court judge or district court judge may not utilize the first-time offender probation provisions under § 16-93-301 et seq. when the defendant is charged with violating § 5-65-303.

(b) Notwithstanding the provisions of § 5-4-301, § 5-4-322, or this section, a circuit court judge or district court judge may:

(1) Utilize probationary supervision, in addition to the mandatory penalties required for a violation of § 5-65-303, solely for the purpose of monitoring compliance with his or her orders; and

(2) Require a defendant to pay a reasonable fee in an amount to be established by the circuit court judge or district court judge.

(c) The court shall keep or cause to be kept a record of all official actions that are the result of a violation of this subchapter, including without limitation:

(1) The ultimate resolution of the case; and

(2) The sentence and fine, if applicable.

(d)(1) The court or clerk of the court shall prepare and immediately forward to the Office of Driver Services within five (5) business days



after the sentencing of a person who has been found guilty or pleaded guilty or nolo contendere to a violation of this subchapter an abstract of the record.

(2) The abstract shall be:

(A) Certified by the person required to prepare it to be true and correct; and

(B) Made upon a form furnished by the office and shall include:

(i) The name and address of the person charged;

(ii) The number, if any, of the driver's license of the person charged;

(iii) The registration number of the motor vehicle or motorboat involved;

(iv) The date of hearing;

(v) The plea;

(vi) The judgment; and

(vii) The amount of the fine and sentence.

**History.** Acts 1993, No. 863, § 8; 2005, No. 1768, § 5; 2015, No. 299, § 13.

**Amendments.** The 2015 amendment rewrote the section.

### 5-65-309. Implied consent.

(a) An underage person who operates a motorboat on the waters of this state or a motor vehicle or is in actual physical control of a motor vehicle or motorboat in this state is deemed to have given consent, subject to § 5-65-203, to a chemical test of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood if:

(1) The underage person is arrested for any offense arising out of an act alleged to have been committed while the underage person was driving or boating while under the influence or driving or boating while there was an alcohol concentration of two hundredths (0.02) but less than eight hundredths (0.08) in his or her breath, blood, saliva, or urine;

(2) The underage person is involved in an accident while operating or in actual physical control of a motorboat on the waters of this state or a motor vehicle; or

(3) The underage person is stopped by a law enforcement officer who has reasonable cause to believe that the underage person, while operating or in actual physical control of a motorboat on the waters of this state or a motor vehicle, is under the influence or has an alcohol concentration of two hundredths (0.02) but less than eight hundredths (0.08) in his or her breath or blood.

(b) An underage person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and a chemical test may be administered subject to § 5-65-203.

**History.** Acts 1993, No. 863, § 9; 2001, No. 561, § 15; 2013, No. 361, § 10; 2015, No. 299, § 13.

**Amendments.** The 2013 amendment inserted “saliva” and “concentration” in (a).

The 2015 amendment inserted “motorboat on the waters of this state or a”, “or motorboat”, and “or boating” throughout the section; added “saliva, or urine” at the end of (a)(1); deleted “the provisions of” twice preceding “§ 5-65-203”; and substituted “An” for “Any” at the beginning of (a) and (b).

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

CASE NOTES

**Breath Test.**

When defendant was arrested for suspicion of underage driving under the influence in violation of § 5-65-303, the deputy’s actions in transporting defendant to a nearby county outside his jurisdiction to administer a breathalyzer test were lawful under the Fourth Amendment because the test had to be given without delay due to the exigent circumstance of defendant’s falling blood alcohol content and in accordance with Health Department regulations. *Pickering v. State*, 2012 Ark. 280, 412 S.W.3d 143 (2012).

**Cited:** *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-310. Refusal to submit to a chemical test.

- (a)(1) If an underage person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency as provided for in § 5-65-309:
- (A) A chemical test shall not be given;
  - (B) The underage person’s driver’s license, driver’s permit, or other evidence of driving privilege shall be seized by the law enforcement officer; and
  - (C) The law enforcement officer shall immediately deliver to the underage person from whom the driver’s license, driver’s permit, or other evidence of driving privilege was seized a temporary driving permit, as provided by § 5-65-402.
- (2) Refusal to submit to a chemical test under this subsection is a strict liability offense and is a violation.
- (b)(1) The Office of Driver Services shall suspend or revoke the driving privileges of an arrested underage person who refuses to submit to a chemical test under this subchapter as follows:
- (A) Suspension for ninety (90) days for a first offense;
  - (B) Suspension for one (1) year for a second offense; and
  - (C) Revocation for a third or subsequent offense.
- (2) A revocation issued under this subsection continues until the underage person reaches twenty-one (21) years of age or for a period of three (3) years, whichever is longer.
- (c) In order to determine the number of previous offenses to consider when suspending or revoking the arrested underage person’s driving privileges, the office shall consider as a previous offense:
- (1) A conviction for violating § 5-65-310; and

(2) A suspension or revocation of driving privileges for an arrest for a violation of § 5-65-310 when the person was not subsequently acquitted of the criminal charge.

(d) The office shall deny the issuance of a license or permit to operate a motor vehicle to an underage person who is a resident and who violates this section but who does not have a license or permit to operate a motor vehicle, in addition to any other penalty under this section, for the following periods of time:

(1) Six (6) months for a first offense; and

(2) One (1) year for a second or subsequent offense.

(e) When an underage nonresident's driving privilege to operate a motor vehicle in this state has been suspended under this section, the office shall notify the entity of issuance of that underage person's nonresident motor vehicle driving privilege of action taken by the office.

(f)(1)(A) A driving privilege that is suspended under this section may be reinstated by the office upon payment of twenty-five dollars (\$25.00) for each occurrence of an offense that resulted in an order of administrative suspension under § 5-65-310.

(B) As used in this subsection, "occurrence" means each separate calendar date when an offense or offenses take place.

(2) The fee under this subsection is not required when an administrative suspension order has been removed because:

(A) The person has been found not guilty of the offense by a circuit court or district court; or

(B) A de novo review of the administrative suspension order by the office resulted in the removal.

(3) Forty percent (40%) of the revenues derived from the fee under this subsection shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Blood Alcohol Program of the Department of Health.

(4) The fee under this subsection is supplemental to and in addition to any fee imposed under § 5-65-119, § 5-65-304, § 27-16-508, or § 27-16-808.

**History.** Acts 1993, No. 863, § 10; 1999, No. 1077, § 20; 2005, No. 1992, § 5; 2007, No. 712, § 4; 2009, No. 633, § 5; 2015, No. 299, § 13.

**Amendments.** The 2015 amendment rewrote the section.

## CASE NOTES

### ANALYSIS

Constitutionality.  
—Standing.

**Constitutionality.**

—Standing.

Where testimony at trial established that defendant voluntarily submitted to a

breathalyzer test, there was no finding that he violated this section, thus, defendant lacked standing to warrant consideration of this section's constitutionality on appeal. *Garrigus v. State*, 321 Ark. 222, 901 S.W.2d 12 (1995).



5-65-311. Relationship to other laws.

- (a) A penalty under this subchapter for violating § 5-65-303 is in addition to other penalties prescribed by law for the offense under another law of the State of Arkansas.
- (b) There is no presumption under this subchapter that an underage person is not under the influence of an intoxicating substance, such as alcohol or a similar intoxicant, if the underage person’s alcohol concentration is four hundredths (0.04) or less.
- (c) The following aspects of the chemical test or instrument for testing breath or blood alcohol concentration under this chapter may be used in the same manner for an offense under this subchapter:
- (1) The administration of a chemical test for breath or blood alcohol;
  - (2) The instrument used to administer the chemical test;
  - (3) The procedure used to calibrate and maintain the instrument; and
  - (4) The use of the chemical test results as evidence.

**History.** Acts 1993, No. 863, § 11; 2001, No. 561, § 16; 2015, No. 299, § 13.

**Amendments.** The 2015 amendment rewrote the section.

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General As-

sembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

CASE NOTES

**Cited:** Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996).

SUBCHAPTER 4 — ADMINISTRATIVE DRIVER’S LICENSE SUSPENSION

SECTION.	SECTION.
5-65-401. Definitions.	5-65-403. Notice and receipt from arresting officer.
5-65-402. Surrender of license or permit to arresting officer.	

**Cross References.** Seizure, suspension, and revocation of license — Temporary permits — Ignition interlock restricted license, § 5-65-104.

**Effective Dates.** Acts 2009, No. 956, § 34: Apr. 6, 2009. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that laws concerning juveniles need to be amended and updated; that the fair and efficient administration of juvenile law is highly important to society at large;

and that this act is immediately necessary because the judiciary needs to begin addressing these changes in laws involving juveniles. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the

bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

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### **5-65-401. Definitions.**

As used in this subchapter:

(1) “Disqualification” means a prohibition against driving a commercial motor vehicle;

(2) “Immobilization” means revocation or suspension of the registration or license plate of a motor vehicle; and

(3) “Sworn report” means a signed and written statement of a certified law enforcement officer, under penalty of perjury, on a form provided by the Director of the Department of Finance and Administration.

**History.** Acts 1999, No. 1077, § 21.

### **5-65-402. Surrender of license or permit to arresting officer.**

(a)(1)(A) At the time of arrest for violating § 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5), the arrested person shall immediately surrender his or her license, permit, or other evidence of driving privilege to the arresting law enforcement officer.

(B) The arresting law enforcement officer shall seize the license, permit, or other evidence of driving privilege surrendered by the arrested person or found on the arrested person during a search.

(C)(i) If a juvenile, as defined in the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., is arrested for violating § 3-3-203(a) or § 5-27-503(a)(3), the arresting officer shall issue the juvenile a citation to appear for a juvenile intake with a juvenile intake officer.

(ii) The arresting officer shall forward a copy of the citation and the license, permit, or other evidence of the driving privilege to the juvenile office before the scheduled juvenile intake.

(iii) Juveniles subject to the jurisdiction of the circuit court under the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., shall not be subject to this section, except as provided in this subdivision (a)(1).

(2)(A)(i) If the license, permit, or other evidence of driving privilege seized by the arresting law enforcement officer has not expired and otherwise appears valid to the arresting law enforcement officer, the arresting law enforcement officer shall issue to the arrested person a dated receipt for that license, permit, or other evidence of driving privilege on a form prescribed by the Office of Driver Services.

(ii) This receipt shall be recognized as a license and authorizes the arrested person to operate a motor vehicle for a period not to exceed thirty (30) days.

(B)(i) The receipt form shall contain and shall constitute a notice of suspension, disqualification, or revocation of driving privileges by the office, effective in thirty (30) days, notice of the right to a hearing within twenty (20) days, and if a hearing is to be requested, as notice that the hearing request is required to be made within seven (7) calendar days of the notice being given.

(ii) The receipt form shall also contain phone numbers and the address of the office and inform the driver of the procedure for requesting a hearing.

(C) If the office is unable to conduct a hearing within the twenty-day period, a temporary permit shall be issued and is valid until the date of the hearing.

(D)(i) The seized license, permit, or other evidence of driving privilege and a copy of the receipt form issued to the arrested person shall be attached to the sworn report of the arresting law enforcement officer and shall be submitted by mail or in person to the office or its designated representative within seven (7) days of the issuance of the receipt.

(ii) The failure of the arresting law enforcement officer to timely file the sworn report does not affect the authority of the office to suspend, disqualify, or revoke the driving privilege of the arrested person.

(3)(A) Any notice from the office required under this subchapter that is not personally delivered shall be sent by certified mail and is deemed to have been delivered on the date when postmarked and shall be sent to the last known address on file with the office.

(B) Refusal of the addressee to accept delivery or attempted delivery of the notice at the address obtained by the arresting law enforcement officer or on file with the office does not constitute nonreceipt of notice.

(C) For any notice that is personally delivered, the person shall be asked to sign a receipt acknowledging that he or she received the required notice.

(4)(A) The office or its designated official shall suspend, revoke, or disqualify the driving privilege of an arrested person or any nonresident driving privilege of an arrested person when it receives a sworn report from the arresting law enforcement officer that he or she had reasonable grounds to believe the arrested person:

(i) Was under twenty-one (21) years of age and purchased or was in possession of intoxicating liquor, wine, or beer in violation of § 3-3-203(a);

(ii) Was under twenty-one (21) years of age and attempted to purchase an alcoholic beverage or use a fraudulent or altered personal identification document for the purpose of purchasing an alcoholic beverage illegally or other material or substance restricted to adult purchase or possession under existing law in violation of § 5-27-503(a)(3); or

(iii) Had been operating or was in actual physical control of a motorboat on the waters of this state or a motor vehicle in violation



of § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2) and the sworn report is accompanied by:

(a) A written chemical test report or a sworn report that the arrested person was operating or in actual physical control of a motorboat on the waters of this state or motor vehicle in violation of § 5-65-103, § 5-65-303, or § 27-23-114; or

(b) A sworn report that the arrested person refused to submit to a chemical test of blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of the arrested person's breath or blood in violation of § 5-65-205, § 5-65-310, or § 27-23-114(a)(5).

(B) The suspension, disqualification, or revocation shall be based as follows:

(i) The driving privileges of a person violating § 5-65-103 shall be suspended or revoked as provided by § 5-65-104;

(ii) The driving privileges of a person violating § 5-65-205(a) shall be suspended or revoked as provided by § 5-65-205(b);

(iii) The driving privileges of a person violating § 5-65-303 shall be suspended or revoked as provided by § 5-65-304(b);

(iv) The driving privileges of a person violating § 5-65-310(a) shall be suspended or revoked as provided by § 5-65-310(b);

(v) The driving privileges of a person violating § 27-23-114(a)(1) or § 27-23-114(a)(2) shall be disqualified as provided by § 27-23-112;

(vi) The driving privileges of a person violating § 27-23-114(a)(5) shall be disqualified as provided by § 27-23-112;

(vii) The driving privileges of a person violating § 3-3-203(a) shall be suspended, revoked, or disqualified as provided by § 3-3-203(e); and

(viii) The driving privileges of a person violating § 5-27-503(a)(3) shall be suspended, revoked, or disqualified as provided by § 5-27-503(d).

(5) In addition to any other penalty provided for in this section, if the arrested person is a resident without a license or permit to operate a motor vehicle in this state:

(A) The office shall deny to that arrested person the issuance of a license or permit for a period of six (6) months for a first offense; and

(B) For a second or subsequent offense by a resident without a license or permit to operate a motor vehicle, the office shall deny to that arrested person the issuance of a license or permit for a period of one (1) year.

(6)(A)(i) If the arrested person is a nonresident, the arrested person's driving privilege in Arkansas shall be suspended in the same manner as that of a resident.

(ii) The office shall notify the office that issued the nonresident's driving privilege of the action taken by the office.

(B) When the arrested person is a nonresident without a license or permit to operate a motor vehicle, the office shall notify the office of issuance for that arrested person's state of residence of action taken by the office.

(7)(A) Upon the written request of a person whose driving privilege has been revoked, denied, disqualified, or suspended, or who has received a notice of revocation, suspension, disqualification, or denial by the arresting law enforcement officer, the office shall grant the person an opportunity to be heard if the request is received by the office within seven (7) calendar days after the notice of the revocation, suspension, disqualification, or denial is given in accordance with this section or as otherwise provided in this chapter.

(B) A request described in subdivision (a)(7)(A) of this section does not operate to stay the revocation, suspension, disqualification, or denial by the office until the disposition of the hearing.

(8)(A) The hearing shall be before the office or its authorized agent, in the office of the Revenue Division of the Department of Finance and Administration nearest the county where the alleged event occurred for which the person was arrested, unless the office or its authorized agent and the arrested person agree otherwise to the hearing's being held in some other county or that the office or its authorized agent may schedule the hearing or any part of the hearing by telephone and conduct the hearing by telephone conference call.

(B) The hearing shall not be recorded.

(C) At the hearing, the burden of proof is on the state and the decision shall be based on a preponderance of the evidence.

(D) The scope of the hearing shall cover the issues of whether the arresting law enforcement officer had reasonable grounds to believe that the person:

(i) Had been operating or was in actual physical control of a motorboat on the waters of this state or a motor vehicle or commercial motor vehicle while:

(a) Intoxicated or impaired;

(b) The person's blood alcohol concentration measured by weight of alcohol in the person's blood was equal to or greater than the blood alcohol concentration prohibited by § 5-65-103(a)(2);

(c) The blood alcohol concentration of a person under twenty-one (21) years of age was equal to or greater than the blood alcohol concentration prohibited by § 5-65-303; or

(d) The person's blood alcohol concentration measured by weight of alcohol in the person's blood was equal to or greater than the blood alcohol concentration prohibited by § 27-23-114;

(ii) Refused to submit to a chemical test of the blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance contents of the person's breath or blood and whether the person was placed under arrest;

(iii) Was under twenty-one (21) years of age and purchased or was in possession of any intoxicating liquor, wine, or beer; or

(iv) Was under twenty-one (21) years of age and attempted to purchase an alcoholic beverage or use a fraudulent or altered personal identification document for the purpose of purchasing an alcoholic beverage illegally or other material or substance restricted to adult purchase or possession under existing law.

(E)(i) The office or its agent at the hearing shall consider any document submitted to the office by the arresting law enforcement agency, document submitted by the arrested person, and the statement of the arrested person.

(ii) The office shall not have the power to compel the production of documents or the attendance of witnesses.

(F)(i) If the revocation, suspension, disqualification, or denial is based upon a chemical test result indicating that the arrested person was intoxicated or impaired and a sworn report from the arresting law enforcement officer, the scope of the hearing shall also cover the issues as to whether:

(a) The arrested person was advised that his or her privilege to drive would be revoked, disqualified, suspended, or denied if the chemical test result reflected an alcohol concentration equal to or in excess of the amount by weight of blood provided by law or the presence of other intoxicating substances;

(b) The breath, blood, saliva, or urine specimen was obtained from the arrested person within the established and certified criteria of the Department of Health;

(c) The chemical testing procedure used was in accordance with existing rules; and

(d) The chemical test result in fact reflects an alcohol concentration, the presence of other intoxicating substances, or a combination of alcohol concentration or other intoxicating substance.

(ii) If the revocation, suspension, disqualification, or denial is based upon the refusal of the arrested person to submit to a chemical test as provided in § 5-65-205, § 5-65-310, or § 27-23-114(a)(5), reflected in a sworn report by the arresting law enforcement officer, the scope of the hearing shall also include whether:

(a) The arrested person refused to submit to the chemical test; and

(b) The arrested person was informed that his or her privilege to drive would be revoked, disqualified, suspended, or denied if the arrested person refused to submit to the chemical test.

(b) After the hearing, the office or its authorized agent shall order the revocation, suspension, disqualification, or denial to be rescinded or sustained and shall then advise any person whose driving privilege is revoked, suspended, or denied that he or she may request a restricted permit as otherwise provided for by this chapter.

(c)(1)(A) A person adversely affected by the hearing disposition order of the office or its authorized agent may file a de novo petition for review within thirty (30) days in the circuit court in the county in which the offense took place.

(B) A copy of the decision of the office shall be attached to the petition.

(C) The petition shall be served on the Director of the Department of Finance and Administration under Rule 4 of the Arkansas Rules of Civil Procedure.

(2)(A) The filing of a petition for review does not stay or place in abeyance the decision of the office or its authorized agent.



(B) If the circuit court issues an order staying the decision or placing the decision in abeyance, the circuit court shall transmit a copy of the order to the office in the same manner that convictions and orders relating to driving records are sent to that office.

(C)(i) The circuit court shall hold a final hearing on the de novo review within one hundred twenty (120) days after the date that the order staying the decision or placing the decision in abeyance is entered.

(ii) The circuit court may conduct the final hearing by telephone conference with the consent of the parties.

(3) An administrative hearing held under this section is exempt from the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(4)(A) On review, the circuit court shall hear the case de novo in order to determine based on a preponderance of the evidence whether a ground exists for revocation, suspension, disqualification, or denial of the person's privilege to drive.

(B) If the results of a chemical test of blood, breath, saliva, or urine are used as evidence in the suspension, revocation, or disqualification of the person's driving privilege, then § 5-65-206 shall apply in the circuit court proceeding.

(d)(1) A decision rendered at an administrative hearing held under this section shall have no effect on any criminal case arising from a violation of § 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5).

(2) Any decision rendered by a court of law for a criminal case arising from any violation of § 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5) shall affect the administrative suspension, disqualification, or revocation of the driving privilege as follows:

(A) A plea of guilty or nolo contendere or a finding of guilt by the court has no effect on an administrative hearing held under this section;

(B)(i) An acquittal on the charges or a dismissal of charges serves to reverse the suspension, disqualification, or revocation of the driving privilege suspended or revoked under this section.

(ii) The office shall reinstate the person's driving privilege at no cost to the person, and the charges shall not be used to determine the number of previous offenses when administratively suspending, disqualifying, or revoking the driving privilege of an arrested person in the future; and

(C) The office shall convert any initial administrative suspension or revocation of a driving privilege for violating § 5-65-103 to a suspension or revocation for violating § 5-65-303 if the person is convicted of violating § 5-65-303 instead of § 5-65-103.

(e) A person whose privilege to drive has been denied, suspended, disqualified, or revoked shall remain under the denial, suspension, disqualification, or revocation and remain subject to penalties as

provided in § 5-65-105 until such time as that person applies for, and is granted by the office, reinstatement of the privilege to drive.

(f) The administrative suspension, disqualification, or revocation of a driving privilege as provided for by this section is supplementary to and in addition to a suspension, disqualification, or revocation of a driving privilege that is ordered by a court of competent jurisdiction for an offense under §§ 5-64-710, 5-65-116, and 27-16-914, or other traffic or criminal offense in which a suspension, disqualification, or revocation of the driving privilege is a penalty for the violation.

(g)(1)(A) A person whose driving privilege is suspended or revoked under this section shall:

(i) Both:

(a) Furnish proof of attendance at and completion of the alcoholism treatment program, alcohol education program, or alcohol and driving education program required by § 5-65-104(b)(1) or § 5-65-307(a)(1) and, if applicable, at a victim impact panel as provided in § 5-65-121 before reinstatement of his or her suspended or revoked driving privilege; and

(b) Pay a fee for reinstatement required under § 5-65-119, § 5-65-304, or, if applicable, § 5-65-121; or

(ii) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(B) An application for reinstatement shall be made to the office.

(2) Even if a person has filed a *de novo* petition for review under subsection (c) of this section, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the *de novo* review in circuit court has occurred.

(3) A person whose driving privilege is suspended or revoked under this section may enroll in an alcohol education program prior to disposition of the offense by the circuit court or district court but is not entitled to a refund of a fee paid if the charge is dismissed or if the person is acquitted of the charge.

(h) Except as provided in subsection (a) of this section, this section shall not apply to juveniles subject to the Arkansas Juvenile Code of 1989, § 9-27-301 et seq.

**History.** Acts 1999, No. 1077, § 21; 2003, No. 541, §§ 2-5; 2005, No. 1535, § 2; 2005, No. 1768, § 6; 2007, No. 922, § 2; 2009, No. 748, § 32; 2009, No. 946, § 3; 2009, No. 956, §§ 2, 3; 2011, No. 610, § 1; 2013, No. 361, §§ 11-14; 2013, No. 488, § 1; 2015, No. 299, § 14.

**A.C.R.C. Notes.** Acts 2009, No. 956, § 3, purported to add a subsection (i) to Title 5, Chapter 65, Subchapter 4. However, the apparent intent was to add a subsection (i) to § 5-65-402.

**Amendments.** The 2011 amendment added (c)(1)(C).

The 2013 amendment by No. 361, in (a)(4)(A)(iii)(b) and (a)(8)(D)(ii), inserted “saliva”, “concentration”, and “breath or”; added “saliva” in (a)(8)(F)(i)(b) and (c)(4)(B).

The 2013 amendment by No. 488 substituted “§ 3-3-203(e)” for “§ 3-3-203(c)” in (a)(4)(B)(vii).

The 2015 amendment inserted “form” in (a)(2)(B)(ii); inserted “motorboat on the waters of this state or a” in (a)(4)(A)(iii) and (a)(8)(D)(i) and “motorboat on the waters of this state or” in (a)(4)(a)(iii)(a); substituted “§ 5-65-103(a)(2)” for “§ 5-65-

103(b)” in (a)(8)(D)(i)(b); deleted “the provisions of” preceding “§ 5-65-206” in (c)(4)(B); deleted “any” preceding “other” in (f); deleted “(g) [Repealed.]” and redesignated former (h) and (i) as (g) and (h); in present (g)(3), substituted “whose driving privilege is suspended or revoked” for “suspended” and deleted “or city court” following “district court”; substituted “driving privilege” for “privilege to operate

a motor vehicle” in (a)(6)(A)(i), for “motor vehicle license” in (a)(6)(A)(ii), for “privilege to drive” in (a)(7)(A) and (c)(4)(B), for “license” in (b) and the introductory language of present (g)(1)(A), and for “driver’s license” throughout (d)(2), (f), and (g)(1)(A)(i)(a); inserted “the Arkansas Juvenile Code of 1989” in (a)(1)(C)(iii) and present (h); and made stylistic changes.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Driving While In-

toxicated, 26 U. Ark. Little Rock L. Rev. 367.

CASE NOTES

ANALYSIS

Constitutionality.  
Sufficiency of Notice.

Constitutionality.

This section was not unconstitutional as applied to the driver where the hearing officer testified she considered the letter from the driver’s doctor and the driver’s final de novo hearing was held seventy days after the stay was granted by the circuit court, well within the 120 day limit imposed under subdivision (c)(2)(C)(i) of this section. *Miller v. Ark. Dep’t of Fin. &*

*Admin.*, 2012 Ark. 165, 401 S.W.3d 466 (2012).

Sufficiency of Notice.

Notice given to a DWI defendant that he was required to request a hearing on his license suspension within seven days was sufficient, although this section and § 5-65-403 specified that the hearing be requested within seven calendar days, because defendant filed his request timely and was given an opportunity to be heard. *Robinette v. Dep’t of Fin. & Admin.*, 2011 Ark. 349 (2011).

5-65-403. Notice and receipt from arresting officer.

(a) At the time of arrest for violating § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2), the arresting law enforcement officer shall provide written notice to the arrested person:

(1) That the registration of a motor vehicle owned by the arrested person is suspended effective in thirty (30) days if the arrested person’s driving privileges have been suspended, disqualified, or revoked for violating § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2) in the previous five (5) years;

(2) Of the right to a hearing within twenty (20) days; and

(3) That the hearing request is required to be made within seven (7) calendar days of the notice being given if the arrested person wants to request a hearing.

(b) The receipt shall also contain phone numbers and the address of the Office of Driver Services and inform the arrested person of the procedure for requesting a hearing.



(c) If the Office of Driver Services is unable to conduct a hearing within the twenty-day period, a temporary permit shall be issued and is valid until the date of the hearing.

(d)(1) The seized license, permit, or other evidence of driving privilege and a copy of the receipt form issued to the arrested person shall be:

(A) Attached to the sworn report of the arresting law enforcement officer; and

(B) Submitted by mail or in person to the Director of the Department of Finance and Administration or his or her designated representative within seven (7) days of the issuance of the receipt.

(2) The failure of the arresting law enforcement officer to timely file the sworn report does not affect the authority of the Office of Driver Services to suspend the registration of a motor vehicle owned by the arrested person.

(e) A notice from the Office of Driver Services required under this section that is not personally delivered shall be sent as provided by § 5-65-402.

(f)(1) If the arrested person is a nonresident, the arrested person's motor vehicle registration in Arkansas shall be suspended in the same manner as that of a resident.

(2) The Office of Driver Services shall notify the out-of-state entity that issued the nonresident's motor vehicle registration of the action taken by the Office of Driver Services.

(g) The hearing shall be held by the Office of Driver Services at the conclusion of any hearing under § 5-65-402 and the scope of the hearing is limited to:

(1) Determining if the arrested person's driving privileges had been suspended, revoked, or disqualified for violation of § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2) in the five (5) years prior to the current offense; and

(2) Determining if any motor vehicle is licensed or registered in the arrested person's name as either owner or co-owner of the motor vehicle.

(h)(1)(A) A person adversely affected by the hearing disposition order of the Office of Driver Services or its authorized agent may file a de novo petition for review within thirty (30) days in the circuit court in the county where the offense took place.

(B) The filing of a petition for review does not stay or place in abeyance the decision of the Office of Driver Services or its authorized agent.

(2) An administrative hearing held under this section is exempt from the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(3) The circuit court shall hear the case de novo on review in order to determine whether, based on a preponderance of the evidence, a ground exists for suspension of the person's motor vehicle registration.

(i) The suspension ordered shall be equal to the suspension of driving privileges ordered under § 5-65-402 or one (1) year, whichever is longer, but shall not exceed five (5) years.

(j)(1)(A) Upon determination that a person is completely dependent on the motor vehicle for the necessities of life, the director may grant a restricted registration to a family member or co-owner of any immobilized motor vehicle.

(B) A restricted registration is not valid for use by the person whose driving privileges have been suspended or revoked.

(2) Operation of a motor vehicle in a manner inconsistent with the restricted registration or license plate has the same effect as operating an unlicensed motor vehicle.

(k) If the director orders immobilization of a motor vehicle, notice of immobilization shall be sent by first-class mail to any persons, other than the arrested person, listed as an owner or co-owner of the immobilized motor vehicle in the records of the Office of Motor Vehicle.

**History.** Acts 1999, No. 1077, § 21; 2015, No. 299, § 15.

**A.C.R.C. Notes.** As enacted by Acts 1999, No. 1077, § 21, this section contained a subsection (j) that read: “The immobilization of motor vehicles shall apply to all offenses occurring on or after January 1, 2000.”

**Amendments.** The 2015 amendment rewrote (a)(1); in (a)(3), deleted “if a hear-

ing is to be requested” following “That” and added “if the arrested person wants to request a hearing”; redesignated provisions of (d)(1) as (d)(1)(A) and (d)(1)(B); substituted “out-of-state entity” for “office” in (f)(2); in (h)(3), deleted “On review” from the beginning, inserted “on review” preceding “in order”, and substituted “exists” for “exist”; and made stylistic changes.

CASE NOTES

Sufficiency of Notice.

Notice given to a DWI defendant that he was required to request a hearing on his license suspension within seven days was sufficient, although § 5-65-402 and this section specified that the hearing be re-

quested within seven calendar days, because defendant filed his request timely and was given an opportunity to be heard. *Robinette v. Dep’t of Fin. & Admin.*, 2011 Ark. 349 (2011).

CHAPTER 66  
GAMBLING

SECTION.

- 5-66-101. Construction of statutes.
- 5-66-102. [Repealed.]
- 5-66-103. Keeping a gambling house.
- 5-66-104. Gaming devices — Prohibition.
- 5-66-105. Gaming devices — Financial interest.
- 5-66-106. Gaming devices — Betting.
- 5-66-107. Gaming devices — In buildings or on vessels.
- 5-66-108. [Repealed.]
- 5-66-109. [Repealed.]
- 5-66-110. Keno, etc.
- 5-66-111. Pinball machines, etc.
- 5-66-112. Card games — Betting.

SECTION.

- 5-66-113. Games of hazard or skill — Betting.
- 5-66-114. Sports or games — Transmission of information.
- 5-66-115. Sports or games — Bribery of participants.
- 5-66-116. Horseracing — Betting.
- 5-66-117. Horseracing — Agency service wagering.
- 5-66-118. Lottery, etc. — Tickets.
- 5-66-119. Lottery — Promotion through sales.
- 5-66-120. Application to Arkansas Scholarship Lottery Act.

**Cross References.** Fines, § 5-4-201.

Recovery of gambling debts and losses, § 16-118-103.

Term of imprisonment, § 5-4-401.

**Effective Dates.** Acts 1877, No. 71, § 8: effective on passage.

Acts 1907, No. 55, § 5: effective on passage.

Acts 1939, No. 209, § 7: approved Mar. 9, 1939. Emergency clause provided: "It is hereby found to be a fact that numerous policy and number games are being operated in this state and on that account an emergency is hereby declared to exist and this act shall become effective immediately upon its passage."

Acts 1951, No. 250, § 3: approved Mar. 19, 1951. Emergency clause provided: "Whereas, the present law is inadequate insofar as it relates to the bribery of participants in amateur and professional sports, and this act being necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist and this act shall take effect and be in full force and effect from and after its passage."

Acts 1953, No. 355, § 5: Mar. 28, 1953. Emergency clause provided: "Whereas, the General Assembly has ascertained that there is a lack of uniformity in the interpretation of the gaming laws of the State of Arkansas, and that an urgent need exists for clarification thereof, and that there is danger of harmful and wide spread gaming and bookmaking establishments being set up in this State unless clarification of the gaming laws be made; and for the accomplishment of this purpose this Act is adopted. An emergency is, therefore, declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

Acts 1977, No. 791, § 5: Mar. 28, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that the laws are uncertain with reference to the legality of messenger or agency service wagering on thoroughbred horses in and out of the State of Arkansas and that there is an urgent need to end this uncertainty and confusion. Therefore, an emergency is hereby declared to exist and this act being necessary for the imme-

diately preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 835, § 4: Apr. 8, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present laws relating to the production, sale and possession of lottery tickets are somewhat vague and could be interpreted to prohibit the printing or other production of lottery tickets by companies in this State for use in states where lotteries are permitted; that the laws relating to lotteries were designed to prohibit the operation of lotteries in Arkansas and were not intended to prohibit the printing of lottery tickets for use where lotteries are permitted; that this Act is designed to clarify such laws and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2009, Nos. 605 and 606, § 27: Mar. 25, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the people of the State of Arkansas overwhelmingly approved the establishment of lotteries at the 2008 General Election; that lotteries will provide funding for scholarships to the citizens of this state; that the failure to immediately implement this act will cause a reduction in lottery proceeds that will harm the educational and economic success of potential students eligible to receive scholarships under the act; and that the state lotteries should be implemented as soon as possible to effectuate the will of the citizens of this state and implement lottery-funded scholarships as soon as possible. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."



RESEARCH REFERENCES

**Am. Jur.** 38 Am. Jur. 2d, Gambling, § 22 et seq.

**Ark. L. Rev.** Legal Control of Business

in Arkansas, 5 Ark. L. Rev. 137.

**C.J.S.** 38 C.J.S., Gaming, § 131 et seq.

CASE NOTES

City Ordinance.

A city ordinance declaring that pinball machines or other gaming devices are a public nuisance and that it is unlawful for any business establishment or individual

to possess pinball machines in any manner within the city is void because in conflict with state statutes. *City of Piggott v. Eblen*, 236 Ark. 390, 366 S.W.2d 192 (1963) (decision under prior law).

5-66-101. Construction of statutes.

- (a) In their construction of the statutes prohibiting gaming, the judges of the several courts in this state shall construe the statutes liberally, with a view of preventing persons from evading the penalty of the law by changing of the name or the invention of new names or devices that now are, or may hereafter be, brought into practice, in any and in all kinds of gaming, and all general terms of descriptions shall be so construed as to have effect, and include all such games and devices as are not specially named.
- (b) In all cases in which construction is necessary, the construction shall be in favor of the prohibition and against the offender.

**History.** Rev. Stat., ch. 44, div. 6, art. 3, § 13; C. & M. Dig., § 2645; Pope’s Dig., § 3335; A.S.A. 1947, § 41-3265.

CASE NOTES

ANALYSIS

Gaming Defined.  
Jurisdiction.  
Role of Chancery Courts.

Gaming Defined.

Gaming is the risking of money, between two or more persons, on a contest or chance of any kind, where one must be loser and the other gainer. The definition of gambling, previously set forth by the court, which comports with the common understanding of the term “gambling,” prevents the statutes from being void-for-vagueness. *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

Jurisdiction.

The general rule prohibiting chancery courts from interfering with prosecutorial functions applied, and the chancery court had no jurisdiction to enjoin the prosecuting attorney from prosecuting any operation that constitutes gambling as described in the Ark. Const., Art. 19, § 14, and defined in this section. *Dickey v. Signal Peak Enters.*, 340 Ark. 276, 9 S.W.3d 517 (2000).

Role of Chancery Courts.

There is a narrow exception to the rule that chancery courts will refrain from interfering with prosecutorial functions, but that exception is limited to the chancery court’s protection of property rights

in the form of lawful businesses; it does not apply to forms of illegal gambling. *Dickey v. Signal Peak Enters.*, 340 Ark. 276, 9 S.W.3d 517 (2000).

**Cited:** *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944); *Bostic v. City*

of Little Rock, 243 Ark. 50, 418 S.W.2d 619 (1967); *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996); *State v. 26 Gaming Machs.*, 356 Ark. 47, 145 S.W.3d 368 (2004).

5-66-102. [Repealed.]

**Publisher’s Notes.** This section, concerning the duties of certain officers regarding gambling violators, was repealed by Acts 2013, No. 1348, § 14. The section

was derived from Rev. Stat., ch. 44, div. 6, art. 3, § 9; C. & M. Dig., § 2642; Pope’s Dig., § 3332; A.S.A. 1947, § 41-3264.

5-66-103. Keeping a gambling house.

(a) A person commits the offense of keeping a gambling house if the person:

(1) Keeps, conducts, or operates, or who is interested directly or indirectly in keeping, conducting, or operating any gambling house or place where gambling is carried on;

(2) Sets up, keeps, or exhibits or causes to be set up, kept, or exhibited or assists in setting up, keeping, or exhibiting any gambling device; or

(3) Is interested directly or indirectly in running any gambling house or in setting up and exhibiting any gambling device, either by furnishing money or another article, for the purpose of carrying on any gambling house.

(b) Keeping a gambling house is a Class D felony.

**History.** Acts 1913, No. 152, §§ 1, 2; C. & M. Dig., §§ 2632, 2633; Pope’s Dig., §§ 3322, 3323; A.S.A. 1947, §§ 41-3251, 41-3252; Acts 2005, No. 70, § 1; 2007, No. 555, § 1; No. 827, § 82.

amended by Acts 2007, No. 827, § 82. However, pursuant to Acts 2007, No. 827, § 240, this section is set out as amended by Acts 2007, No. 555, § 1.

**A.C.R.C. Notes.** This section was **Cross References.** Municipalities may suppress, § 14-54-103.

RESEARCH REFERENCES

**Ark. L. Rev.** Kindt, Legalized Gambling Activities as Subsidized by Taxpayers, 48 Ark. L. Rev. 889.

Recent Development: Gambling, 58 Ark. L. Rev. 283.

CASE NOTES

ANALYSIS

Constitutionality.  
Construction.  
Purpose.  
Bingo.  
Common-Law Nuisance.  
Evidence.

Gambling Devices.  
Gambling Houses.  
Indictment.  
Instructions.  
Intent.  
Jury Question.  
Lesser-Included Offenses.  
Sentence.

**Constitutionality.**

This section is not unconstitutionally overbroad. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

**Construction.**

This sentencing provisions of this section and the Criminal Code can be read in harmony: one defines the term of imprisonment and the other permits the court to impose suspension or probation. *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

**Purpose.**

Statutes pertaining to gambling show clear intent to suppress all unlicensed gambling in this state. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

**Bingo.**

Bingo establishments where money and risk were plainly involved had fair warning that their actions were prohibited. *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

The operation of a commercial bingo hall meets the definition of a gambling house, and is therefore a common-law public nuisance. *Masterson v. State ex rel. Bryant*, 329 Ark. 443, 949 S.W.2d 63 (1997).

**Common-Law Nuisance.**

Although persons who maintain a place for betting on horse races may be prosecuted under this section and § 5-66-116 they might also be prosecuted under former section which provided for punishment of common-law crimes for maintaining a common-law nuisance. *Blumensteil v. State*, 148 Ark. 421, 230 S.W. 262 (1921).

Operator of bookmaking establishment, which was a gambling house and therefore a public nuisance at common law and a felony under this section, was precluded from invoking the protection of a court of equity in order to operate it without molestation from the state police. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1943).

**Evidence.**

Testimony by the owner of the property regarding a small hole which had been cut in a door of which he had no knowledge, as to whether hole was used as a peep hole, or as a serving shelf for food held properly

refused. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948).

It is not necessary that the state prove that the defendant actually engaged in wagering to convict under this section. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

**Gambling Devices.**

Tables, blackboards and other articles being actually used by bookmaker in carrying on the betting operations and not being used for any other purpose were gambling devices. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1943).

There may be gambling devices that are no less such, although not always so used, but which, from their nature, may be used for other purposes. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Teletype machines used to furnish horse race information to various gambling houses with operator's knowledge of the use made by the gambling houses of the information which he was furnishing them from the teletype machine were converted into gambling devices. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Testimony that police officer answered calls to a defendant's telephone regarding racing forms, placing bets, etc., held admissible to show the use being made of the telephone. *Liberto v. State*, 248 Ark. 350, 451 S.W.2d 464 (1970).

**Gambling Houses.**

One would be guilty of running a gambling house if he permitted gaming tables to be exhibited and gambling to be carried on in a house controlled by him whether he engaged in gambling or maintained or exhibited such tables and other gambling devices or not. *Turner v. State*, 153 Ark. 40, 239 S.W. 373 (1922).

An establishment maintained for the purpose of receiving and making bets on horse races is a gambling house. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1943); *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Refusal to instruct jury that it was necessary for it to find that defendant receive a profit or other remuneration before the defendant could be found guilty of operating a gambling house held not error, as gravamen of the offense is the maintaining of a house for gambling, and



not the profit realized therefrom. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948).

Evidence held sufficient to support a conviction for operation of a gambling house. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948); *Pope v. State*, 215 Ark. 216, 219 S.W.2d 940 (1949).

Where land, on which there were plank tables used for gambling purposes, was part of railroad right of way, but, as far as defendant's patrons were concerned, defendant controlled place, defendant might properly be convicted. *Colbert v. State*, 218 Ark. 790, 238 S.W.2d 749 (1951).

Evidence of gambling and statement of defendant to officers that he and another person owned the place was sufficient to make a case for the jury in prosecution for keeping a gambling house. *Copeland v. State*, 226 Ark. 198, 289 S.W.2d 524 (1956).

The keeping of a gambling house is not limited by this section to a place where those engaged in gambling find shelter and it was not error to refuse an instruction that a finding that the defendant operated a place where those desiring to engage in gambling might resort to and find shelter while engaged in gambling was required for conviction. *Liberto v. State*, 248 Ark. 350, 451 S.W.2d 464 (1970).

Evidence of cockfighting and loud, open gambling on premises owned by the defendant was sufficient to convict under this section. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

### **Indictment.**

An indictment alleging that a sheriff, knowing that certain persons were exhibiting gambling devices in the county, failed to arrest them was held to state an offense under this section. *Mays v. Robertson*, 172 Ark. 279, 288 S.W. 382 (1926).

### **Instructions.**

Instructions by the court conformed to this section, where the jury was required under the instructions to find that the defendant had an interest in the conduct and operation of the gambling house. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948).

Where grand jury returns separate indictments against defendant, one for a felony in operating a gambling house, and one for a misdemeanor in setting up gambling devices, and defendant proceeds to trial on felony charge, he is not entitled to an instruction by the court on misdemeanor charge. *Pope v. State*, 215 Ark. 216, 219 S.W.2d 940 (1949).

### **Intent.**

When the mental culpability requirement of § 5-2-203 is read into this section, it is clear that a person must act purposely, knowingly, or recklessly for a violation to occur. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

### **Jury Question.**

Whether defendant's house in a residential area was a gambling house was a jury question. *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893 (1974).

### **Lesser-Included Offenses.**

It was not error for the judge to refuse to give an instruction defining the offense under § 5-66-104 as a lesser-included offense of that proscribed by this section where the defendant was either guilty of operating a gambling house or guilty of nothing at all. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975).

### **Sentence.**

The alternative-sentencing provisions, permitting suspended sentence or probation, are applicable to offenses under this section, even though this section has its own penal provision. *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

**Cited:** *Buchanan v. State*, 214 Ark. 835, 218 S.W.2d 700 (1948); *Hardwick v. State*, 220 Ark. 464, 248 S.W.2d 377 (1952); *Campbell v. City of Hot Springs*, 232 Ark. 878, 341 S.W.2d 225 (1960); *Moore v. State*, 244 Ark. 1197, 429 S.W.2d 122 (1968); *State v. Adkisson*, 251 Ark. 119, 471 S.W.2d 332 (1971); *Thompson v. State*, 298 Ark. 502, 769 S.W.2d 6 (1989); *United States v. Thompson*, 925 F.2d 234 (8th Cir. 1991).

**5-66-104. Gaming devices — Prohibition.**

(a) It is unlawful for a person to set up, keep, or exhibit any gaming table or gambling device, commonly called “A. B. C.”, “E. O.”, roulette, or rouge et noir, any faro bank, or any other gaming table or gambling device, or bank of the like or similar kind, or of any other description although not named in this section, regardless of the name or denomination, either:

(1) Adapted, devised, or designed for the purpose of playing any game of chance; or

(2) At which any money or property may be won or lost.

(b) Upon conviction, a person who violates this section is guilty of an unclassified misdemeanor and shall be fined in any sum not less than one hundred dollars (\$100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

**History.** Rev. Stat., ch. 44, div. 6, art. 3, § 3320; A.S.A. 1947, § 41-3253; Acts § 1; C. & M. Dig., § 2630; Pope’s Dig., 2009, No. 748, § 33.

**CASE NOTES****ANALYSIS**

Purpose.

Acts Constituting Offense.

Evidence.

Gambling Device.

Gaming Defined.

Lesser-Included Offenses.

Money or Property.

Multiple Convictions.

Separate Offenses.

**Purpose.**

It was the purpose of this section to suppress any of the gambling devices constantly being invented to evade the gambling laws. *Portis v. State*, 27 Ark. 360 (1872); *Euper v. State*, 35 Ark. 629 (1880).

Statutes pertaining to gambling show clear intent to suppress all unlicensed gambling in this state. *Albright v. Muncief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

**Acts Constituting Offense.**

One who keeps a billiard table and permits others to play upon it for so much per game, to be paid for by the loser, violates this section. *State v. Sanders*, 86 Ark. 353, 111 S.W. 454 (1908).

The fact that the owner of the table plays in the game of poker and furnishes chips to others does not make him an exhibitor of a gaming table. *Tully v. State*, 88 Ark. 411, 114 S.W. 920 (1908).

One who furnishes any device by which

money may be won or lost through chance or skill is guilty of exhibiting a gambling device. *Johnson v. State*, 101 Ark. 159, 141 S.W. 493 (1911).

One who shows a table specially prepared for a game of “craps” for the purpose of attracting betters, and who retains, for the use of the table, a certain percent of the bets, violates this section. *Gershner v. State*, 106 Ark. 488, 153 S.W. 600 (1913).

**Evidence.**

Evidence held sufficient to support conviction. *Hill v. State*, 264 Ark. 313, 571 S.W.2d 228 (1978).

A telephone-card vending machine was an illegal gambling device where the machine operated as follows: (1) a patron would place a \$1 bill in the machine, and the machine would then print an “Emergency Long Distance Telephone Card” good for three minutes of long distance; (2) at the same time, the machine would register a number of play credits; (3) the patron could then play a game on the machine “similar to tic-tac-toe on a 3 x 3 matrix consisting of various symbols which may be lined up for additional points,” (4) these points could then be redeemed for a cash prize ranging from \$1 to \$1,000; (5) additionally, after using the prepaid telephone card, the patron could mail the used card to the defendant for a supplemental drawing for various prizes



such as electronics or airline tickets; and (6) if a patron did not wish to purchase a telephone card but still wanted to play the game, he or she could use one of the self-addressed, stamped post cards provided at the store and mail it to the defendants for a free-play certificate, which could be redeemed for a \$1 bill to play the game. *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001).

### **Gambling Device.**

Particular items held to be gambling devices. *Riley v. State*, 120 Ark. 450, 179 S.W. 661 (1915); *Howell v. State*, 184 Ark. 109, 40 S.W.2d 782 (1931); *Steed v. State*, 189 Ark. 389, 72 S.W.2d 542 (1934); *Stanley v. State*, 194 Ark. 483, 107 S.W.2d 532 (1937).

Teletype machines used to furnish horse racing information to various gambling houses with operator's knowledge of the use made by the gambling houses of the information which he was furnishing them from the teletype machine were converted into gambling devices. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Mere intention to use seized radio equipment in connection with gambling did not make radio equipment a gambling device, if equipment had never been used for gambling. *Burnside v. State*, 219 Ark. 596, 243 S.W.2d 736 (1951).

Merely setting up a machine that gives free games does not violate this section, but when the free games won on the machine were converted to cash by the proprietor's paying off the games in money the machine clearly became a gambling device. *Bostic v. City of Little Rock*, 241 Ark. 671, 409 S.W.2d 825 (1966).

Trial court correctly found the owners' video poker and video slot machines were illegal gaming devices and subject to destruction in that they were designed for the purpose of playing a game of chance whereby winning credits entitled the player to continue to play, or if a player had won sufficient credits, to redeem the credits for a prize; although the owners had paid taxes on them as amusement devices, that fact alone did not legalize, authorize, license, or permit any machine equipped with any automatic payoff mechanism. *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 848 (2002).

Three countertop machines were not gaming devices per se where no tokens, money, or prizes were offered in connection with the machines; the machines were more akin to video arcade machines intended for amusement because a player inserted money and could play gambling-like games, but never received anything in return except amusement. *State v. 26 Gaming Machs.*, 356 Ark. 47, 145 S.W.3d 368 (2004).

Just as devices described as slot machines in another case were determined to be illegal gaming devices, defendant's devices were gambling devices proscribed by this section; because they were slot machines, they were expressly excluded by § 26-57-403(a) from the definition of amusement devices found at § 26-57-402. *Paris v. State*, 87 Ark. App. 344, 192 S.W.3d 277 (2004).

### **Gaming Defined.**

Gaming is the risking of money, between two or more persons, on a contest or chance of any kind, where one must be loser and the other gainer. The definition of gambling, previously set forth by the court, which comports with the common understanding of the term "gambling," prevents the statutes from being void for vagueness. *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

### **Lesser-Included Offenses.**

Refusal to give an instruction defining the offense under this section as a lesser-included offense of that prescribed by § 5-66-103 where the defendant was either guilty of operating a gambling house or guilty of nothing at all held proper. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975).

### **Money or Property.**

The words "money or property" as used in this section mean any money or any valuable thing or any representative of anything that is esteemed of value. *Rankin v. Mills Novelty Co.*, 182 Ark. 561, 32 S.W.2d 161 (1930).

### **Multiple Convictions.**

This section is violated by every one who sets up or exhibits any one of the games named, and he may be separately convicted for maintaining each device. *Jacobs v. State*, 100 Ark. 591, 141 S.W. 489 (1911).



**Separate Offenses.**

The offense under this section is distinct from that defined by § 5-66-107, and if both are charged in the same indictment, one will be quashed. *State v. Morris*, 45 Ark. 62 (1885); *Lyman v. State*, 90 Ark. 596, 119 S.W. 1116 (1909).

**Cited:** *Colbert v. State*, 218 Ark. 790, 238 S.W.2d 749 (1951); *Bostic v. City of Little Rock*, 243 Ark. 50, 418 S.W.2d 619 (1967); *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973); *Mullins v. State*, 359 Ark. 414, 198 S.W.3d 504 (2004).

**5-66-105. Gaming devices — Financial interest.**

(a) It is unlawful for any person in any way, either directly or indirectly, to be:

(1) Interested or concerned in any gaming prohibited by § 5-66-104, either by furnishing money or another article for the purpose of carrying on gaming; or

(2) Interested in the loss or gain of gaming prohibited by § 5-66-104.

(b) Upon conviction, a person who violates this section is guilty of an unclassified misdemeanor and shall be fined in any sum not less than one hundred dollars (\$100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

**History.** Rev. Stat., ch. 44, div. 6, art. 3, § 3321; A.S.A. 1947, § 41-3254; Acts § 2; C. & M. Dig., § 2631; Pope's Dig., 2007, No. 827, § 83.

**CASE NOTES****ANALYSIS**

Employees and Employer.  
Instruction.

**Employees and Employer.**

Any person who is employed by and assists the proprietor in the operation of a gambling device is subject to prosecution. *Trimble v. State*, 27 Ark. 355 (1872).

The employment of another to watch after a slot machine, in the operation of which money was lost and won, was an offense under this section. *Jeffries v. State*, 61 Ark. 308, 32 S.W. 1080 (1895).

**Instruction.**

Refusal to give instruction defining the offense covered by this section as lesser included offense of the crime defined by § 5-66-103(a), where there was no evidence which would have supported a conviction under this section, held proper. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975).

**Cited:** *Hill v. State*, 264 Ark. 313, 571 S.W.2d 228 (1978).

**5-66-106. Gaming devices — Betting.**

(a) It is unlawful for any person to bet any money or other valuable thing or any representative of any thing that is esteemed of value on any game prohibited by § 5-66-104.

(b) Upon conviction, a person who violates this section is guilty of a violation and shall be fined in any sum not exceeding one hundred dollars (\$100) nor less than fifty dollars (\$50.00).

**History.** Rev. Stat., ch. 44, div. 6, art. 3, § 3324; A.S.A. 1947, § 41-3255; Acts § 3; C. & M. Dig., § 2634; Pope's Dig., 2007, No. 827, § 84.

## CASE NOTES

**Cited:** *Gordon v. Town of DeWitt*, 106 Ark. 283, 153 S.W. 807 (1913); *Henry v. State*, 280 Ark. 24, 655 S.W.2d 372 (1983).

**5-66-107. Gaming devices — In buildings or on vessels.**

(a) It is unlawful for any owner or occupant of any house, outbuilding, or other building or any steamboat, or other vessel to knowingly permit or suffer any games, tables, or banks mentioned in § 5-66-104 or permit or suffer any kind of gaming under any name, to be carried on or exhibited in his or her house, outbuilding, or other building, or on board of any steamboat, flatboat, keelboat, or other vessel on any of the waters within this state.

(b) Upon conviction, a person who violates this section is guilty of an unclassified misdemeanor and shall be fined in any sum not less than one hundred dollars (\$100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

**History.** Rev. Stat., ch. 44, div. 6, art. 3, § 3325; A.S.A. 1947, § 41-3256; Acts § 4; C. & M. Dig., § 2635; Pope's Dig., 2007, No. 827, § 85.

## CASE NOTES

## ANALYSIS

Purpose.

Acts Constituting Offense.

Indictment.

Separate Offense.

**Purpose.**

The offense designed to be punished by this section is the permitting by the owner of any house of any of the games prohibited in § 5-66-104, and not the playing or betting at the games mentioned in § 5-66-112. *Stith v. State*, 13 Ark. (8 English) 680 (1853).

**Acts Constituting Offense.**

Where the keeper of a shop rents an adjoining room, with an understanding that it is to be used by the lessee for gaming purpose and permits the game of faro to be carried on in that room under his observation, he is guilty of knowingly permitting gaming to be carried on in his house. *Brockway v. State*, 36 Ark. 629 (1880).

This section is violated by everyone who sets up, keeps, or exhibits any gambling devices without respect to whether more than one is exhibited at the same time and place. *Jacobs v. State*, 100 Ark. 591, 141 S.W. 489 (1911).

**Indictment.**

Indictment held sufficient. *Turner v. State*, 153 Ark. 40, 239 S.W. 373 (1922).

**Separate Offense.**

The offense of exhibiting a gambling device and knowingly permitting it to be exhibited in a house owned or occupied by the accused are not the same, but distinct and if charged in the same indictment it will be quashed upon demurrer unless the prosecuting attorney will elect upon which he will prosecute. *State v. Morris*, 45 Ark. 62 (1885).

**Cited:** *Vanderworker v. State*, 13 Ark. (8 English) 700 (1853); *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S.W. 257 (1902).

**5-66-108. [Repealed.]**

**Publisher’s Notes.** This section, concerning search warrants for gaming devices, was repealed by Acts 2013, No. 1348, § 15. The section was derived from

Rev. Stat., ch. 44, div. 6, art. 3, §§ 6, 7; C. & M. Dig., §§ 2637, 2638; Pope’s Dig., §§ 3327, 3328; A.S.A. 1947, §§ 41-3259, 41-3260.

**5-66-109. [Repealed.]**

**Publisher’s Notes.** This section, concerning gaming devices and vagrants, was repealed by Acts 2013, No. 1348, § 16. The section was derived from Rev. Stat.,

ch. 44, div. 6, art. 3, § 5; Rev. Stat., ch. 154, § 2; C. & M. Dig., §§ 2636, 2802; Pope’s Dig., §§ 3326, 3506; A.S.A. 1947, §§ 41-3257, 41-3258.

**5-66-110. Keno, etc.**

(a) If a person sets up or exhibits, causes to be set up or exhibited, or aids or assists in setting up or exhibiting in the state any gaming device commonly known and designated as “keno” or any similar device by any other name or without a name, upon conviction the person is guilty of a violation and shall be fined in any sum not less than two hundred dollars (\$200) for benefit of the common school fund.

(b)(1) It is the duty of each prosecuting attorney in this state who knows or is informed of any person exhibiting or setting up, or aiding or assisting in setting up any device described in subsection (a) of this section in his or her district, to take immediate steps to have the person immediately arrested for trial, and the prosecuting attorney shall have the person arrested as provided in this subsection for each separate offense done or committed on every separate day.

(2) If any prosecuting attorney who knows or is informed of any violation of this section refuses or neglects to cause the arrest and trial of the person so offending within five (5) days next after he or she knows or is informed of the offense, upon indictment and conviction, the prosecuting attorney shall be fined in any sum not less than five hundred dollars (\$500).

(c)(1) It is the duty of every justice of the peace, knowing or being informed of any violation of subsection (a) of this section, in his or her township, for which the person has not been arrested or tried under the provisions of this section, to cause the arrest and trial of the person so offending, for each separate offense done or committed against the provisions of this section.

(2) If any justice of the peace who knows or is informed of any violation of subsection (a) of this section in his or her township refuses or neglects to cause the arrest and trial of the person so violating subsection (a) of this section, within five (5) days next after he or she is informed of the same, the justice of the peace is guilty of a misfeasance in office, and, upon indictment and conviction, the circuit court shall remove him or her from office.

(d) No license granted by any city or town is a bar to any prosecution or conviction under a provision of this section or any excuse, protection,



or justification for any justice of the peace or prosecuting attorney failing to carry out the same.

**History.** Acts 1877, No. 71, §§ 1-5, 7, p. 70; C. & M. Dig., §§ 2646-2651; Pope's Dig., §§ 3336-3341; A.S.A. 1947, §§ 41-3266 — 41-3271; Acts 2009, No. 748, § 34.

### **5-66-111. Pinball machines, etc.**

(a)(1) Any coin-operated pinball machine or other device that is designed so that more than one (1) coin can be inserted so as to give the player additional odds in making a high score or winning an additional free game is unlawful.

(2) The operation of the coin-operated pinball machine or other device described in subdivision (a)(1) of this section is a misdemeanor that is punishable by the imposition of a fine not to exceed one thousand dollars (\$1,000) or imprisonment in the county jail for not more than one (1) year, or both.

(b) It is the intent of this section to prohibit the use of so-called "bingo"-type pinball machines, the interstate transportation of which is prohibited by 15 U.S.C. § 1172.

(c)(1) A coin-operated amusement device, including a pinball machine, that takes only one (1) coin for each player for each game and that is equipped with flippers that can be activated by the player to propel a ball back onto the playing surface of the machine so as to prolong the playing time and increase the score attained by the player and upon which not more than twenty-five (25) free games can be won by the player are specifically designated as an amusement device.

(2) The use of an amusement device described in subdivision (c)(1) of this section is declared to be legal so long as all state and municipal taxes have been paid and the owner of the amusement device has obtained a permit, filed a bond, and paid the privilege tax required by § 26-57-401 et seq.

**History.** Acts 1977, No. 283, §§ 1, 2; A.S.A. 1947, §§ 41-3201, 41-3202.

### **5-66-112. Card games — Betting.**

If a person bets any money or any valuable thing on any game of brag, bluff, poker, seven-up, three-up, twenty-one, vingt-et-un, thirteen cards, the odd trick, forty-five, whist, or at any other game of cards known by any name now known to the law or with any other or new name or without any name, upon conviction he or she is guilty of a violation and shall be fined in any sum not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00).

**History.** Rev. Stat., ch. 44, div. 6, art. 3, § 3329; A.S.A. 1947, § 41-3261; Acts § 8; C. & M. Dig., § 2639; Pope's Dig., 2009, No. 748, § 35.

CASE NOTES

ANALYSIS

Acts Constituting Offense.  
Evidence.  
Indictment.  
Separate Offense.

Acts Constituting Offense.

Parties who play at cards under an agreement that the beaten party shall treat the others to cigars are guilty of gaming under this section. *State v. Wade*, 43 Ark. 77 (1884).

Evidence.

A participant in the game is a competent witness. *Robinson v. State*, 41 Ark. 400 (1883).

In a prosecution for gaming by playing poker, the sheriff's testimony as to the

similarity as to arrangement and equipment in the boat where the raid took place and other poker games which he had raided was held admissible. *Honea v. State*, 176 Ark. 640, 3 S.W.2d 679 (1928).

Indictment.

An indictment for gaming need not allege the names of the parties playing the game if known, nor the grand jury's ignorance of their names if not known. *Goodman v. State*, 41 Ark. 228 (1883).

Separate Offense.

Proof of violating this section will not sustain an indictment under § 5-66-104. *Tully v. State*, 88 Ark. 411, 114 S.W. 920 (1908).

**Cited:** *Hudson v. State*, 173 Ark. 1169, 294 S.W. 15 (1927).

5-66-113. Games of hazard or skill — Betting.

(a) If a person bets any money or any valuable thing on any game of hazard or skill, upon conviction he or she is guilty of a violation and shall be fined in any sum not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00).

(b) In prosecuting under subsection (a) of this section it is sufficient for the indictment to charge that the defendant bet money or another valuable thing on a game of hazard or skill, without stating with whom the game was played.

**History.** Acts 1855, §§ 1, 2, p. 270; C. & M. Dig., §§ 2640, 2641; Pope's Dig., §§ 3330, 3331; A.S.A. 1947, §§ 41-3262, 41-3263; Acts 2009, No. 748, § 36.

CASE NOTES

ANALYSIS

Dog Racing.  
Indictment.

Dog Racing.

Betting on dog races violates this section. *Fox v. Harrison*, 178 Ark. 1189, 13 S.W.2d 808 (1929) (decision prior to the enactment of § 23-111-205).

Indictment.

An indictment for betting on a game of "hazard or skill" is not objectionable for the use of the disjunction. *State v. Hester*, 48 Ark. 40, 2 S.W. 339 (1886).

**Cited:** *Mace v. State*, 58 Ark. 79, 22 S.W. 1108 (1893).

5-66-114. Sports or games — Transmission of information.

(a)(1) It is unlawful for any person, partnership, or corporation to receive or transmit information in the State of Arkansas relating to football, baseball, basketball, hockey, polo, tennis, horse racing, boxing, or any other sport or game for the purpose of gaming.

(2) This section does not apply to a radio station or newspaper disseminating such information as news, entertainment, or advertising medium.

(3) The provisions of this section do not apply to any commission conducting a legalized race meet within the State of Arkansas.

(b) Any teletype, telegraph ticker tape, or similar machine or device used in the transmitting or receiving of information relating to a game or sport as set out in subsection (a) of this section, that is used either directly or indirectly for the purpose of gaming, is defined and declared to be a “gaming device”.

(c) Any person who violates a provision of this section and any teletype, telegraph ticker tape, or similar machine or device when used for gaming purposes, as defined in this section, is subject to the procedure and penalties as set out in §§ 5-66-101 — 5-66-110, 5-66-112, 5-66-113, 5-66-116, and 5-66-118.

**History.** Acts 1953, No. 355, §§ 1-3;  
A.S.A. 1947, §§ 41-3282 — 41-3284.

### **5-66-115. Sports or games — Bribery of participants.**

(a) As used in this section:

(1) “Participant” means any:

(A) Professional or amateur baseball, football, basketball, hockey, polo, tennis, or other athletic player;

(B) Boxer;

(C) Jockey, driver, groom, or other person participating or expecting to participate in a horse race, including an owner of a race track or the owner’s employee, steward, trainer, judge, starter, or special police officer; or

(D) Manager, coach, or trainer of any sport team or participant or prospective participant in any sport team, sport game, or sport contest; and

(2) “Sport” means any:

(A) Professional or amateur baseball, football, basketball, hockey, polo, tennis, or other athletic game or contest;

(B) Boxing match; or

(C) Horse race.

(b) It is unlawful for any person to give, promise, or offer to any participant in any sport any valuable thing with the purpose to influence the participant to lose or try to lose or cause to be lost or to limit the participant’s or the participant’s team’s margin of victory in a sport in which the participant is taking part or expects to take part or has any duty or connection.

(c) It is unlawful for any participant to solicit or accept any valuable thing to influence the participant to lose or try to lose or cause to be lost or to limit the participant’s or the participant’s team’s margin of victory in a sport in which the participant is taking part or expects to take part or has any duty or connection.



(d) Upon conviction, any person who violates this section is guilty of a Class D felony.

**History.** Acts 1951, No. 250, § 1; 1975, No. 928, § 9; A.S.A. 1947, § 41-3288; Acts 2007, No. 827, § 86.

### **5-66-116. Horseracing — Betting.**

(a) It is unlawful to directly or indirectly bet in this state, by selling or buying pools or otherwise, any money or other valuable thing, on any horse race of any kind whether had or run in this state or out of this state.

(b)(1) Upon conviction, a person who violates subsection (a) of this section is guilty of:

(A) A violation for the first offense and shall be fined in any sum not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00);

(B) A violation for the second offense and shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100); and

(C) An unclassified misdemeanor for all offenses after the second offense and shall be fined in any sum not more than five hundred dollars (\$500) and imprisoned for a term of not less than thirty (30) days nor more than six (6) months.

(2) Every bet, wager, sale of pools, or purchase of pools is deemed a separate offense.

(c) It is the duty of circuit judges and prosecuting attorneys of this state, the grand juries and mayors of the cities and towns of this state, the police officers and marshals of the cities and towns, and the justices of the peace, sheriffs, and constables to enforce the provisions of this section when this section is violated in their presence or when the information of the violation is brought to their knowledge by affidavit or otherwise.

(d) If any sheriff, constable, or police officer refuses or neglects to immediately arrest and bring before some court of competent jurisdiction for trial any person who violates this section, when the knowledge of the violation is brought to his or her attention by the affidavit of any resident of the county where the offense is committed, the sheriff, constable, or police officer is deemed guilty of nonfeasance in office and upon conviction shall be fined in any sum not more than five hundred dollars (\$500) and shall be removed from office.

**History.** Acts 1907, No. 55, §§ 1-4, p. 134; C. & M. Dig., §§ 2669-2672; Pope's Dig., §§ 3355-3358; A.S.A. 1947, §§ 41-3278 — 41-3281; Acts 2009, No. 748, § 37.

**Cross References.** Arkansas Horse Racing Law, inconsistent statutes inapplicable, § 23-110-102.

## CASE NOTES

## ANALYSIS

Applicability.

Betting.

Common-Law Nuisances.

Gambling House.

Instruction.

Successive Offenses.

**Applicability.**

This section is not applicable to dog races. *Fox v. Harrison*, 178 Ark. 1189, 13 S.W.2d 808 (1929).

**Betting.**

The agreement between parties that the loser pay the winner as a result of their wager, brings the transaction within the prohibition of this section, and it is not necessary that money be put up. *Wolf v. State*, 135 Ark. 574, 206 S.W. 39 (1918).

**Common-Law Nuisances.**

Although persons who maintain a place for betting on horse races may be prosecuted under this section and § 5-66-103, they might also be prosecuted for maintaining a common-law nuisance. *Blumen-*

*steil v. State*, 148 Ark. 421, 230 S.W. 262 (1921).

**Gambling House.**

An establishment maintained for the purpose of receiving and making bets on horse races is a gambling house. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1943).

**Instruction.**

Refusal to give instruction defining the offense covered by this section as lesser included offense of the crime defined by § 5-66-103, where there was no evidence which would have supported a conviction under this section held proper. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975).

**Successive Offenses.**

One may be punished for a second offense though the conviction for the first offense did not occur within one year before the return of the indictment for the second offense. *Wolf v. State*, 135 Ark. 574, 206 S.W. 39 (1918).

**Cited:** *Western Union Tel. Co. v. Estes*, 213 Ark. 719, 212 S.W.2d 333 (1948).

**5-66-117. Horseracing — Agency service wagering.**

(a)(1) It is unlawful for any person, either for himself or herself or as agent or employee of another person, to place, offer, or agree to place, either in person or by messenger, telephone, or telegraph, a wager on behalf of another person, for a consideration paid or to be paid by or on behalf of the other person, on a thoroughbred horse race being conducted in or out of this state.

(2) Upon conviction, a person who violates subdivision (a)(1) of this section is guilty of a Class D felony.

(b) It is a defense to prosecution under this section if a defendant can prove that his or her wager on behalf of another person was:

- (1) Of a casual nature with no profit motive; and
- (2) Merely an accommodation to the other person.

**History.** Acts 1977, No. 791, §§ 1, 2; A.S.A. 1947, §§ 41-3203, 41-3204; Acts 2007, No. 827, § 87.

## CASE NOTES

**Cited:** *Post v. Harper*, 980 F.2d 491 (8th Cir. 1992).

**5-66-118. Lottery, etc. — Tickets.**

(a) Except as authorized under the Charitable Bingo and Raffles Enabling Act, § 23-114-101 et seq., it is unlawful for a person to:

(1) Keep an office, room, or place for the sale or disposition of a lottery ticket or slip, policy ticket or slip, gift concert ticket or slip, or like device;

(2) Vend, sell, or otherwise dispose of any lottery ticket or slip, policy ticket or slip, gift concert ticket or slip, or like device;

(3) Possess any lottery ticket or slip, policy ticket or slip, or gift concert ticket or slip, or like device, except a lottery ticket issued in another state where a lottery is legal; or

(4) Be interested, either directly or indirectly, in the sale or disposition of any lottery ticket or slip, policy ticket or slip, or gift concert ticket or slip, or like device.

(b) In any prosecution or investigation under this section, it is no exemption for a witness that his or her testimony may incriminate himself or herself, but no such testimony given by the witness shall be used against him or her in any prosecution except for perjury, and the witness is discharged from liability for any violation of the law upon his or her part disclosed by his or her testimony.

(c)(1) The General Assembly recognizes that:

(A) The present laws relating to lotteries are vague in certain areas and, although designed to prohibit the operation of lotteries in the state, may be interpreted to prohibit even the printing of lottery tickets by companies in this state for distribution in other states where lotteries are legal;

(B) There are companies in this state that print various types of tickets, stamps, tags, coupon books, and similar devices and that may be interested in printing lottery tickets for states where lotteries are lawful; and

(C) It is the intent and purpose of this subsection to clarify the present law relating to lotteries to specifically permit businesses in Arkansas to print lottery tickets for use in states where lotteries are lawful.

(2)(A) The printing or other production of lottery tickets by a business located in Arkansas for use in a state where a lottery is permitted is declared to be lawful.

(B) Nothing contained in this section and § 5-66-119 or any other law shall be construed to make printing or production of lottery tickets described in subdivision (c)(2)(A) of this section unlawful.

(d)(1) Upon conviction, any person who violates this section is guilty of a violation and shall be fined an amount not to exceed ten thousand dollars (\$10,000).

(2) A second or subsequent offense is a Class D felony.

**History.** Acts 1939, No. 209, §§ 1-6; 1987, No. 835, §§ 1, 2; 1993, No. 1053, A.S.A. 1947, §§ 41-3272 — 41-3277; Acts § 1; 2007, No. 388, § 2; 2009, No. 748,



§§ 38, 39.

**Publisher's Notes.** Acts 1987, No. 835,  
§§ 1, 2 is also codified at § 5-66-119.

**Cross References.** Lotteries, Ark.  
Const., Art. 19, § 14.

## RESEARCH REFERENCES

**Ark. L. Rev.** Criminal Law — Lotteries  
— Consideration Necessary to Constitute,  
10 Ark. L. Rev. 223.

## CASE NOTES

### Lottery.

A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize. *Burks v. Harris*, 91 Ark. 205, 120 S.W. 979 (1909) (decision under prior law).

Where a newspaper manager purchased an automobile under a conditional agreement, reserving title in the vendor, the fact that the vendor knew that the purchaser intended to give the machine away in a popularity contest (conceding that such contest was in effect a lottery) did not affect the validity of the contract of

sale. *Watkins v. Curry*, 103 Ark. 414, 147 S.W. 43 (1912) (decision under prior law).

A popularity contest, with no element of chance in it, is not illegal as a lottery. *Millsaps v. Urban*, 116 Ark. 90, 171 S.W. 1198 (1914) (decision under prior law).

Buying a chance for valuable consideration paid or to be paid to obtain a possible prize is a lottery even though limited to members of an alleged charitable organization and although some of the money goes to charity. *State v. Bass*, 224 Ark. 976, 277 S.W.2d 479 (1955).

**Cited:** *In re Armstrong*, 217 B.R. 569 (Bankr. E.D. Ark. 1998).

### 5-66-119. Lottery — Promotion through sales.

(a)(1) Any person who in this state, directly or indirectly, sets up, promotes, engages in, or in any manner participates in any plan, scheme, device, or other means, either alone or in concert with any other person, firm, or corporation, either within or without the State of Arkansas, in which goods, property, or any other thing of value is sold to any person, firm, or corporation for any consideration, either cash or otherwise, and upon the further consideration that the purchaser agrees to obtain one (1) or more persons to participate in the plan, scheme, device, or other means by making a similar purchase and a similar agreement to secure one (1) or more other persons to participate in the plan, scheme, device, or other means in the same manner, each purchaser being given the right to obtain money, credits, goods, or some other thing of value, depending upon the number of persons joining in or participating in the plan, scheme, device, or other means, is declared to have set up, promoted, engaged in, or participated in a lottery, which is declared to be unlawful.

(2) The promotion, engaging in, or participation in the plan, scheme, device, or other means described in subdivision (a)(1) of this section is punishable as provided in this section.

(b)(1) Upon a complaint filed by any interested person, on relation of the State of Arkansas, the Attorney General, or any prosecuting

attorney of any county where a plan, scheme, device, or other means described in subdivision (a)(1) of this section is proposed, promoted, operated, engaged in, or participated in, the circuit court of the county where the plan, scheme, device, or other means described in subdivision (a)(1) of this section is set up, proposed, operated, promoted, engaged in, or participated in may enjoin the further operation, promotion of, engagement, or participation in the plan, scheme, device, or other means.

(2) Any injunction under subdivision (b)(1) of this section may be granted without bond furnished by the plaintiff, and the circuit court may make further orders touching upon the subject matter as it may find necessary and desirable.

(c)(1) The General Assembly recognizes that:

(A) The present laws relating to lotteries are vague in certain areas and, although designed to prohibit the operation of lotteries in the state, may be interpreted to prohibit even the printing of lottery tickets by companies in this state for distribution in other states where lotteries are legal;

(B) There are companies in this state that print various types of tickets, stamps, tags, coupon books, and similar devices and that may be interested in printing lottery tickets for states where lotteries are lawful; and

(C) It is the intent and purpose of this subsection to clarify the present law relating to lotteries to specifically permit businesses in Arkansas to print lottery tickets for use in states where lotteries are lawful.

(2)(A) The printing or other production of lottery tickets by a business located in Arkansas for use in a state where a lottery is permitted is declared to be lawful.

(B) Nothing contained in this section and § 5-66-119 or any other law shall be construed to make printing or production of lottery tickets described in subdivision (c)(2)(A) of this section unlawful.

(d) Any person who violates a provision of this section commits a Class D felony.

**History.** Acts 1961, No. 49, §§ 1-3; 2. 1975, No. 928, § 10; A.S.A. 1947, §§ 41-

**Publisher's Notes.** Acts 1987, No. 835, 3285 — 41-3287; Acts 1987, No. 835, §§ 1, §§ 1, 2 is also codified at § 5-66-118.

## RESEARCH REFERENCES

**Ark. L. Rev.** Kindt, Legalized Gambling Activities as Subsidized by Taxpayers, 48 Ark. L. Rev. 889.

**5-66-120. Application to Arkansas Scholarship Lottery Act.**

This chapter does not apply to a lottery under the Arkansas Scholarship Lottery Act, § 23-115-101 et seq.

**History.** Acts 2009, No. 605, § 2; 2009, No. 606, § 2.

**CHAPTER 67**  
**HIGHWAYS AND BRIDGES**

SECTION.

- 5-67-101. Advertising signs generally.
- 5-67-102. False or misleading signs.
- 5-67-103. Attaching signs to utility poles or living plants.
- 5-67-104. Violation of posted bridge prohibitions.

SECTION.

- 5-67-105. Wreckage near memorial highway.
- 5-67-106. Use of spotlight.
- 5-67-107. Solicitation on or near a highway.

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**Effective Dates.** Acts 1925, No. 135, § 5: approved Mar. 5, 1925. Emergency clause provided: “This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared and the same shall take effect and be in force from and after its passage.”

Acts 1971, No. 249, § 6: Mar. 9, 1971. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that there is an immediate need to control the widening gap between highway needs and highway revenues in Arkansas, which is a matter of grave concern to the General Assembly, and that by the immediate passage of this Act significant efforts to conserve those revenues and to retard the accrual of needs may be realized. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

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**5-67-101. Advertising signs generally.**

(a) It is unlawful for any person, firm, or corporation to place any advertising sign on the highway right-of-way in this state, except for a sign placed under direction of the State Highway Commission.

(b) Any person violating a provision of this section or § 5-39-213 is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

**History.** Acts 1941, No. 359, §§ 2, 3; A.S.A. 1947, §§ 41-3355, 41-3356; Acts 2005, No. 1994, § 54.

**Publisher’s Notes.** Acts 1941, No. 359, § 3, is also codified as § 5-39-213(b).

**Cross References.** Placing advertising on private property without owner’s written permission, § 5-39-213.

Regulation of outdoor advertising, § 27-74-101 et seq.



RESEARCH REFERENCES

**Ark. L. Rev.** Legal Control of Business in Arkansas, 5 Ark. L. Rev. 137.      Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

**5-67-102. False or misleading signs.**

(a) It is unlawful for any person, firm, or corporation to erect or cause to be erected or maintained on or within one hundred yards (100 yds.) of the right-of-way of any state highway any sign or billboard that has printed, painted, or otherwise placed on the sign or billboard words or figures:

(1) Calculated to cause the traveling public of this state or tourists from other states to abandon the state highway and travel any public road to any town, city, or destination in this state unless the sign or billboard is erected and maintained by and with the consent and approval of the State Highway Commission; or

(2) That give to the traveling public any false or misleading information pertaining to the highways of this state.

(b) Any person, firm, or corporation violating a provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

(c) The commission shall remove and destroy any signboard within one hundred yards (100 yds.) of the right-of-way of any state highway that gives to the traveling public any false or misleading information pertaining to the highways of this state.

**History.** Acts 1925, No. 135, §§ 1-4; Pope's Dig., §§ 3660-3663; A.S.A. 1947, §§ 41-3351 — 41-3354; Acts 2005, No. 1994, § 54; Acts 2007, No. 827, § 88.      **Cross References.** Regulation of outdoor advertising, limitations, § 27-74-302.

RESEARCH REFERENCES

**Ark. L. Rev.** Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

**5-67-103. Attaching signs to utility poles or living plants.**

(a)(1) It is unlawful for any person, firm, corporation, or association to nail, staple, or otherwise attach or cause to be nailed, stapled, or otherwise attached any sign, poster, or billboard to any public utility pole or to any living tree, shrub, or other plant located upon the rights-of-way of any public road, highway, or street in this state.

(2) However, this prohibition does not apply to a warning, safety, or identification sign attached to a public utility pole by a utility company or cooperative.

(b)(1) Any person, firm, corporation, or association violating a provision of this section is guilty of a violation and upon conviction shall be

fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500).

(2) Each day that any violation under subdivision (b)(1) of this section continues constitutes a separate offense.

**History.** Acts 1967, No. 420, §§ 1, 2; A.S.A. 1947, §§ 41-3362, 41-3363; Acts 2005, No. 1994, § 54.

#### **5-67-104. Violation of posted bridge prohibitions.**

(a) It is unlawful for any person owning or operating a motor vehicle that in any way exceeds or violates any properly posted limitation, regulation, or restriction governing the use of a bridge structure to use the bridge structure so long as the use violates any posted prohibition.

(b)(1) Any unlawful action resulting in a violation of a provision of subsection (a) of this section is a violation and upon conviction the person shall be punished by a fine of not more than two hundred dollars (\$200).

(2) The person is liable for the costs to restore the damage and injury to the bridge structure occasioned by the violation.

**History.** Acts 1971, No. 249, §§ 2, 3; A.S.A. 1947, §§ 41-3365, 41-3366; Acts 2005, No. 1994, § 54.

#### **5-67-105. Wreckage near memorial highway.**

(a) If any person or corporation stores wrecked, worn out, or discarded automobiles or other scrap iron or steel within two hundred yards (200 yds.) of any public highway in the State of Arkansas, a part of which has been or may be designated by law as a memorial highway, it is the person's or corporation's duty to:

(1) Construct a solid fence or wall high enough to hide the wrecked, worn out, or discarded automobiles or other scrap iron or steel from a person passing along the memorial highway; or

(2) Hide the wrecked, worn out, or discarded automobiles or other scrap iron or steel behind a house or other structure or elevation of the land that conceals the wrecked, worn out, or discarded automobiles or other scrap iron or steel from public view of a person passing along the memorial highway.

(b) Any person failing to comply with a provision of this section is guilty of a violation and shall be fined five dollars (\$5.00) for each day that he or she fails to comply, with the fine to go to the local school district where the site of the violation is located.

**History.** Acts 1933, No. 165, §§ 1, 2; § 1; 2005, No. 1994, § 54. Pope's Dig., §§ 3657, 3658; A.S.A. 1947, §§ 41-3357, 41-3358; Acts 1997, No. 379, § 27-74-401 et seq.

**Cross References.** Junkyard control,

**5-67-106. Use of spotlight.**

(a) It is unlawful to use a spotlight from any public road, street, or highway except for use by:

(1) A law enforcement officer, game and fish officer, emergency service worker, or utility company employee in the performance of his or her duties;

(2) A person or his or her employee to examine real or personal property or livestock owned or rented by the person; or

(3) A person to assist in the repair or removal of a motor vehicle or other property.

(b) This section does not apply within the boundaries of a city of the first class or a city of the second class.

(c) A violation of this section is a Class C misdemeanor.

**History.** Acts 1987, No. 625, § 1.

**5-67-107. Solicitation on or near a highway.**

(a) It is unlawful for any person to solicit a donation or offer to sell any item or service:

(1) On a state highway;

(2) Within ten feet (10') of a state highway, if there is not a sidewalk along the highway; or

(3) Between the highway and a sidewalk, if there is a sidewalk within ten feet (10') of the highway.

(b) A violation of this section is a Class C misdemeanor.

**History.** Acts 1993, No. 980, § 1.

**CHAPTER 68**  
**OBSCENITY**

SUBCHAPTER.

- 1. GENERAL PROVISIONS. [RESERVED.]
- 2. OFFENSES GENERALLY.
- 3. STATE STANDARDS DEFINING AND REGULATING OBSCENITY.
- 4. ARKANSAS LAW ON OBSCENITY.
- 5. SELLING OR LOANING PORNOGRAPHY TO MINORS.

**RESEARCH REFERENCES**

**ALR.** Statute or ordinance prohibiting use of “obscene” language in public. 2 A.L.R.4th 1331.

Jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 A.L.R.4th 1318.

Processor’s right to refuse to process or return film or videotape of obscene subject. 18 A.L.R.4th 1326.

Statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited. 25 A.L.R.4th 395.

Validity of ordinances restricting loca-



tion of "adult entertainment" or sex-oriented businesses, 10 A.L.R.5th 538.

**Am. Jur.** 50 Am. Jur. 2d, Lewdness, § 4 et seq.

**Ark. L. Rev.** Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

Constitutional Law: Captivity of an Audience Viewing Screen of Drive-In Theater Outside of Premises, 30 Ark. L. Rev. 82.

The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

**C.J.S.** 67 C.J.S., Obscenity, § 1 et seq.

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## SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved.]

## SUBCHAPTER 2 — OFFENSES GENERALLY

### SECTION.

5-68-201. Exhibition of obscene figures.

5-68-202. Sale or possession of literature rejected by U.S. mail.

### SECTION.

5-68-203. Obscene films.

5-68-204. Nudism.

5-68-205. Public display of obscenity.

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**Preambles.** Acts 1931, No. 155, contained a preamble which read: "Whereas, there is, at this time, being offered for sale in numerous places within the State of Arkansas various forms and classes of magazines, papers, and literature which are grossly obscene, and

"Whereas, owing to its obscene and immoral nature, much of this literature is not permitted by the Federal Government to be sent through the United States mails but is shipped into the State of Arkansas by express companies and by motor vehicle carriers;

"Now, therefore ..."

**Effective Dates.** Acts 1931, No. 155, § 3: Mar. 20, 1931.

Acts 1957, No. 38, § 5: Feb. 13, 1957. Emergency clause provided: "It is hereby determined by the General Assembly of

the State of Arkansas that there has grown up in various parts of the nation and in the State of Arkansas a form of recreation or participation known as nudism which entails such practices as sunbathing, hiking, swimming, and other activities in the nude and in the presence of persons of the opposite sex. It is further determined that such forms of recreation, participation, activities and practices constitute a clear and present danger to the public peace, health, welfare, safety and morals of the State of Arkansas, and this Act is necessary for the preservation of the public peace, health, welfare, safety and morals. An emergency is, therefore, declared to exist and this Act shall be in full force and effect from and after its passage and approval."

## RESEARCH REFERENCES

**Ark. L. Rev.** The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.

**5-68-201. Exhibition of obscene figures.**

(a) Any person publicly exhibiting any obscene figure is guilty of a violation.

(b) Any person convicted under a provision of this section shall be fined in any sum not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100).

**History.** Rev. Stat., ch. 44, div. 6, art. 2, §§ 41-3551, 41-3552; Acts 2005, No. 1994, §§ 2, 3; C. & M. Dig., §§ 2700, 2701; Pope's Dig., §§ 3386, 3387; A.S.A. 1947, § 184.

**CASE NOTES****Jury Question.**

Question of obscenity must be submitted to the jury as a question of fact and the finding of the court, sitting as a jury, may not be disturbed if sustained by testimony sufficient to support that conclusion by an

ordinary man of average intelligence. *Hadley v. State*, 205 Ark. 1027, 172 S.W.2d 237 (1943).

**Cited:** *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973).

**5-68-202. Sale or possession of literature rejected by U.S. mail.**

(a) It is unlawful for any person, firm, or corporation to sell or to offer for sale or to have in possession any magazine, paper, or other literature or printed book, picture, or matter the shipment or transportation of which has been refused and rejected from the United States mail or which literature or literature of like character the United States Government does not permit to be sold, shipped, or handled.

(b)(1) Any violation of a provision of this section constitutes a violation and upon conviction the offender is subject to a fine of any sum not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100).

(2) Each day that this section is violated constitutes a separate offense.

**History.** Acts 1931, No. 155, §§ 1, 2; §§ 41-3556, 41-3557; Acts 2005, No. 1994, Pope's Dig., §§ 3381, 3382; A.S.A. 1947, § 55.

**5-68-203. Obscene films.**

(a) It is unlawful for any person to knowingly exhibit, sell, offer to sell, give away, circulate, produce, distribute, attempt to distribute, or have in his or her possession any obscene film.

(b) As used in this section:

(1) "Film" means motion picture film, still picture film, slides, and movie film of any type;

(2) "Obscene" means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest; and

(3) "Person" means any individual, partnership, firm, association, club, corporation, or other legal entity.

(c)(1) Any person that knowingly exhibits, sells, offers to sell, gives away, circulates, produces, distributes, or attempts to distribute any obscene film is guilty of a Class D felony.

(2) Any person that has in his or her possession an obscene film is guilty of a Class A misdemeanor.

**History.** Acts 1967, No. 411, §§ 1-3; A.S.A. 1947, §§ 41-3578 — 41-3580; Acts 2005, No. 1994, § 429.

**Publisher's Notes.** This section may be impliedly repealed by §§ 5-68-301 — 5-68-308.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.  
Jans, Survey of Constitutional Law, 3

U. Ark. Little Rock L.J. 184.  
DeSimone, Survey of Criminal Law, 3 U. Ark. Little Rock L.J. 191.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Exhibition, Sale, Etc.  
Implied Repeal.  
Knowledge.

### Constitutionality.

It was not essential that a statute incorporate every nuance of constitutional dictum and this section were not unconstitutional under the First Amendment of the U.S. Constitution for failing to include in the definition of obscene the requirement that the film be utterly without redeeming social value. *Bullard v. State*, 252 Ark. 806, 481 S.W.2d 363 (1972).

This section is a valid constitutional regulation of obscene films when limited to that which constituted (a) patently offensive representations or descriptions of ultimate sexual acts whether normal, perverted, actual or simulated and (b) patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals. *Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974).

This section is not unconstitutional because it does not contain a provision that alleged obscene material may be redeemed because of any measure of social value. *Herman v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974), cert. denied, 420 U.S. 953, 95 S. Ct. 1337, 43 L. Ed. 2d 431 (1975).

This section is not unconstitutional because it does not on its face limit the area of proscribed material to offensive depictions of sexual conduct or because the only standard prescribed is whether the material appeals to prurient interest. *Herman v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974), cert. denied, 420 U.S. 953, 95 S. Ct. 1337, 43 L. Ed. 2d 431 (1975).

Where theater operators had been warned by a judge that a film might be obscene, conviction under this section for exhibition of the film, subsequent to the U.S. Supreme Court Miller decision (*Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)) and prior to the upholding by the state Supreme Court of this section under the standards set forth in the Miller decision, was not an ex post facto application of law as the theater operators had ample warning that the showing of the film could be viewed as a violation of the state obscenity statute. *Herman v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974), cert. denied, 420 U.S. 953, 95 S. Ct. 1337, 43 L. Ed. 2d 431 (1975).

This section is not unconstitutionally vague in violation of due process. *Smith v. State*, 258 Ark. 549, 528 S.W.2d 360 (1975); *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

Since that part of this section declaring possession of obscene films to be a misdemeanor, is separable from the other part which declares prohibited acts to be felonies, the misdemeanor provision does not



affect the constitutionality of the felony provisions. *Smith v. State*, 258 Ark. 549, 528 S.W.2d 360 (1975); *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

The state's attempt to make mere private possession of obscene material a crime is an unconstitutional invasion of that person's First Amendment rights. *Buck v. State*, 265 Ark. 434, 578 S.W.2d 579 (1979).

#### **Exhibition, Sale, Etc.**

Showing an obscene film without charge or compensation is a violation of the laws of this state. *Buck v. State*, 263 Ark. 249, 564 S.W.2d 215 (1978).

Defendant who sold obscene films was improperly charged under this section. *State v. Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979).

#### **Implied Repeal.**

The chancery court had no jurisdiction under this section because the section is exclusively of a criminal nature and contains no reference to any civil remedy.

*Southland Theatres, Inc. v. State*, 254 Ark. 192, 492 S.W.2d 421 (1973).

For cases discussing the implied repeal of this section by Acts 1977, No. 464 (repealed), see *Buck v. State*, 263 Ark. 249, 564 S.W.2d 215 (1978); *State v. Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979).

#### **Knowledge.**

Where there was no evidence from which the jury could have found, without resorting to surmise and conjecture, that the defendant had knowledge that the film sold was an obscene film, as required for conviction, the trial court erred in denying the defendant's motion for directed verdict at the conclusion of the state's case. *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

To sustain a conviction under this section, scienter requires more than a mere belief which warrants further inspection or inquiry. *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

**Cited:** *Southland Theaters, Inc. v. State ex rel. Tucker*, 254 Ark. 639, 495 S.W.2d 148 (1973).

### **5-68-204. Nudism.**

(a) As used in this section, "nudism" means the act or acts of a person or persons congregating or gathering with his, her, or their private parts exposed in the presence of one (1) or more persons of the opposite sex as a form of social practice.

(b) The provisions of this section do not apply to the enumerated acts if:

(1) The purpose of the person committing the act or acts is to render medical or surgical treatment or to determine the need for medical or surgical treatment or to cleanse such sexual part, and the person committing the act:

(A) Is a licensed physician, as defined by § 17-80-101, or any such physician of a sister state making a professional call into Arkansas;

(B) Committed the act under the professional direction of any physician described in subdivision (b)(1)(A) of this section; or

(C) Is a nurse duly registered or licensed by the Arkansas State Board of Nursing; or

(2) The persons are married legally one to another.

(c) It is unlawful for any:

(1) Person, club, camp, corporation, partnership, association, or organization to advocate, demonstrate, or promote nudism; or

(2) Person to rent, lease, or otherwise permit his or her land, premises, or buildings to be used for the purpose of advocating, demonstrating, or promoting nudism.

(d) Any person, club, camp, corporation, partnership, association, or organization violating any provision of this section is guilty of a Class A misdemeanor for each offense.

(e) This section does not repeal any existing laws of the State of Arkansas except those in direct conflict with this section but this section is cumulative to the existing laws of the State of Arkansas.

**History.** Acts 1957, No. 38, §§ 1-4; A.S.A. 1947, §§ 41-3558 — 41-3561; Acts 2005, No. 1994, § 351.

### CASE NOTES

**Advocacy, Demonstration, Etc.**

Showing by theatre owner of film depicting nude persons did not constitute

advocacy of nudism. *Mini-Art Operating Co. v. State*, 253 Ark. 364, 486 S.W.2d 8 (1972).

### 5-68-205. Public display of obscenity.

(a)(1) As used in this subsection:

(A) “Obscene” means the same as “obscene material” defined by § 5-68-302; and

(B) “Obscenity” means an obscene sticker, painting, decal, emblem, or other device that is or contains an obscene writing, description, photograph, or depiction.

(2) A person commits the offense of publicly displaying an obscenity if the person knowingly causes an obscenity to be displayed in a manner that is readily visible to the public and the obscenity’s content or character is distinguishable by normal vision.

(3) Publicly displaying an obscenity is a Class B misdemeanor.

(b)(1) It is unlawful to publicly display obscene material as defined by § 5-68-302 on any motor vehicle or wearing apparel.

(2) A violation of this subsection is a Class C misdemeanor.

**History.** Acts 1989, No. 200, § 1; 1989, No. 584, § 1; 2007, No. 827, §§ 89, 90.

### RESEARCH REFERENCES

**Ark. L. Rev.** The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

### SUBCHAPTER 3 — STATE STANDARDS DEFINING AND REGULATING OBSCENITY

SECTION.

5-68-301. Legislative declaration.

5-68-302. Definitions.

5-68-303. Promoting obscene materials.

5-68-304. Promoting obscene performance.

SECTION.

5-68-305. Obscene performance at a live public show.

5-68-306. Publicly displaying obscene material for advertising purposes.

SECTION.	SECTION.
5-68-307. Public display of hard-core sexual conduct.	5-68-308. Defenses.

**Cross References.** Sexual exploitation of children generally, § 5-27-301 et seq.

Use of children in sexual performances, § 5-27-401 et seq.

**Effective Dates.** Acts 1981 (1st Ex. Sess.), No. 28, § 11: Dec. 1, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the prompt and efficient

administration of justice in the State of Arkansas has been hindered by the existence of conflicting legislation on the topic of obscenity. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after its passage and approval."

RESEARCH REFERENCES

**Ark. L. Rev.** The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

5-68-301. Legislative declaration.

- (a) The General Assembly finds and declares that:
- (1) The definition and regulation of obscenity are matters of statewide concern;

(2) In defining and regulating obscenity, a statewide standard is workable; and

(3) There is a need for clarification of the applicable law relating to the definition and regulation of obscenity.
- (b)(1) To this end, it is the intent of this subchapter to impose a statewide standard for the definition and regulation of obscenity that is applicable throughout the state and all political subdivisions.
- (2) No political subdivision shall enact any ordinance, rule, or regulation in conflict with a provision of this subchapter.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 1; A.S.A. 1947, § 41-3585.

CASE NOTES

**Cited:** Marjak, Inc. v. Cowling, 626 F. Supp. 522 (W.D. Ark. 1985).

5-68-302. Definitions.

- As used in this subchapter:
- (1) "Advertising purposes" means a purpose of propagandizing in connection with the commercial sale of a product or type of product, the



commercial offering of a service, or the commercial exhibition of an entertainment;

(2) "Hard-core sexual conduct" means a patently offensive act, exhibition, representation, depiction, or description of:

(A) An intrusion, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body into the genital or anal opening of any person's body; or

(B) Cunnilingus, fellatio, anilingus, bestiality, a lewd exhibition of genitals, or an excretory function, actual or simulated;

(3) "Live public show" means a public show in which a human being, an animal, or both appear bodily before a spectator or customer;

(4) "Obscene material" means a material that:

(A) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(B) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(C) Taken as a whole, lacks serious literary, artistic, political, or scientific value;

(5) "Obscene performance" means a play, motion picture, dance, show, or other presentation, whether pictured, animated, or live, performed before an audience and that in whole or in part depicts, or reveals, sexual conduct, hard-core sexual conduct, or sadomasochistic abuse, or that includes an explicit verbal description or a narrative account of sexual conduct or hard-core sexual conduct, and that:

(A) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(B) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(C) Taken as a whole, lacks serious literary, artistic, political, or scientific value;

(6) "Promote" means to produce, direct, perform in, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, or advertise, for consideration, or to offer or agree to do any of these things for consideration;

(7) "Public show" means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, regardless of whether an admission or other charge is levied or collected and regardless of whether a minor is admitted or excluded;

(8) "Sadomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in an undergarment or in revealing or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of a person so clothed, in a sexual context; and

(9) "Sexual conduct" means human masturbation or sexual intercourse.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 2; A.S.A. 1947, § 41-3585.1.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Hard-Core Sexual Conduct.  
Obscene Material.  
—In General.  
—“Appeals.”  
—Statewide Standards.

### Constitutionality.

This section is not void for vagueness. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

### Hard-Core Sexual Conduct.

Described activities held to meet the statutory definition of former law for “hard-core sexual conduct.” *Century Theaters, Inc. v. State*, 274 Ark. 484, 625 S.W.2d 511 (1981) (decision under prior law).

### Obscene Material.

#### —In General.

Under former law, a judge’s preliminary determination, prior to issuance of search warrant, that films of hard-core sexual conduct appealed to the prurient interest of the average person, applying contemporary statewide standards, and lacked serious literary, artistic, political, or scientific value was warranted where the judge knew that the place to be searched was a theater wherein movies were being shown to patrons in individual booths and where testimony of detectives describing the films indicated that the films would appeal to the prurient interests of the average person and that there was little probability of the films containing anything of value. *Century Theaters, Inc. v. State*, 274 Ark. 484, 625 S.W.2d 511 (1981) (decision under prior law).

This section does not use circular definition which ordinary persons cannot understand in defining “obscene material.” *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Allegedly obscene material must be judged basis of a community standard encompassing all levels of sensitivity, of religiousness, and of economic, educational, and social standings. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Obscene material is that which, taken as a whole and applying contemporary statewide standards, attempts to activate prurient interest; the average person is quite capable of making that determination, and whether or not the material is successful in doing so is beside the point. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Evidence of pandering to prurient interests in the creation, promotion, or dissemination of the material is relevant in determining whether the material is obscene. *Oglesby v. State*, 299 Ark. 403, 773 S.W.2d 443 (1989).

#### —“Appeals.”

Legislature intended for the word “appeals” in subdivision (4)(B) to mean (1) an earnest or urgent request, entreaty, or supplication; (2) a resort or application to some higher authority, as for sanction, corroboration, or decision; (3) the power of attracting or of arousing interest. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

#### —Statewide Standards.

Survey of several establishments selling obscene materials in state’s most urban area would not be representative of a statewide standard, as is required by subdivision (4)(B). *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

**Cited:** 4000 *Asher, Inc. v. State*, 290 Ark. 8, 716 S.W.2d 190 (1986); *Dunlap v. State*, 303 Ark. 222, 795 S.W.2d 920 (1990).

**5-68-303. Promoting obscene materials.**

(a) Except as otherwise provided in § 5-68-308, a person commits promoting obscene materials if he or she knowingly promotes, or has in his or her possession with intent to promote, any obscene material.

(b) As used in this section, "material" means any writing, picture, motion picture, film, slide, drawing, or other visual reproduction.

(c) Promoting obscene materials is a Class D felony.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 3; A.S.A. 1947, § 41-3585.2.

**RESEARCH REFERENCES**

**ALR.** Constitutionality of state statutes banning distribution of sexual devices. 94 A.L.R.5th 497.

**CASE NOTES****ANALYSIS**

Construction.

Evidence.

Search and Seizure.

**Construction.**

Former law which prohibited the showing of an obscene film for compensation but did not prohibit such a showing for free, did not repeal, either expressly or by implication, § 5-68-203 et seq., which prohibits the showing of any obscene film, regardless of compensation inasmuch as the two acts are not in direct conflict. *Buck v. Steel*, 263 Ark. 249, 564 S.W.2d 215 (1978) (decision under prior law).

**Evidence.**

Evidence was sufficient to sustain conviction. *Dunlap v. State*, 303 Ark. 222, 795

S.W.2d 920 (1990), cert. denied, 498 U.S. 1121, 111 S. Ct. 1076, 112 L. Ed. 2d 1181 (1991).

**Search and Seizure.**

Where the articles were offered for public sale by the bookstore, and the officers walked in and bought them, there was no violation of the prohibition against unreasonable searches and seizures, and the defendant, an employee of the bookstore, could be arrested without a prior judicial determination of obscenity. *4000 Asher, Inc. v. State*, 290 Ark. 8, 716 S.W.2d 190 (1986).

**Cited:** *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155 (1987); *Oglesby v. State*, 299 Ark. 403, 773 S.W.2d 443 (1989).

**5-68-304. Promoting obscene performance.**

(a) A person commits promoting an obscene performance if he or she knowingly:

(1) Directs, manages, finances, or presents an obscene performance;  
or

(2) Promotes any obscene performance, as owner, producer, director, manager, or performer.

(b) Promoting an obscene performance is a Class D felony.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 4; A.S.A. 1947, § 41-3585.3.



**5-68-305. Obscene performance at a live public show.**

(a) A person commits an obscene performance at a live public show if he or she knowingly:

(1) Engages in an obscene performance of sadomasochistic abuse, hard-core sexual conduct, or sexual conduct in a live public show; or

(2) Directs, manages, finances, or presents an obscene performance at a live public show in which a participant engages in sadomasochistic abuse, hard-core sexual conduct, or sexual conduct.

(b) Committing an obscene performance at a live public show is a Class C felony.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 5; A.S.A. 1947, § 41-3585.4.

**5-68-306. Publicly displaying obscene material for advertising purposes.**

(a) Except as otherwise provided in § 5-68-308, a person commits publicly displaying obscene material for advertising purposes if, for advertising purposes, he or she knowingly:

(1) Displays publicly or causes to be displayed publicly obscene material; or

(2) Permits any display of obscene material on premises owned, rented, or operated by him or her.

(b) “Displays publicly” means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare or a vehicle on a public thoroughfare.

(c) Publicly displaying obscene material for advertising purposes is a Class B misdemeanor.

(d) In any prosecution for violation of this section, it is an affirmative defense for the defendant to prove that the public display was:

(1) Primarily for artistic purposes or as a public service even though in connection with a commercial venture; or

(2) Of nudity, exhibited by a bona fide art, antique, or similar gallery or exhibition and visible in a normal display setting.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 6; A.S.A. 1947, § 41-3585.5.

**RESEARCH REFERENCES**

**ALR.** Constitutionality of state statutes banning distribution of sexual devices. 94 A.L.R.5th 497.

**5-68-307. Public display of hard-core sexual conduct.**

(a) A person commits a public display of hard-core sexual conduct if he or she knowingly engages in hard-core sexual conduct in an open public place.

(b) Engaging in hard-core sexual conduct in an open public place is a Class D felony.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 7; A.S.A. 1947, § 41-3585.6.

**RESEARCH REFERENCES**

**ALR.** What constitutes “public place” within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place. 95 A.L.R.5th 229.

**5-68-308. Defenses.**

(a) No employee is liable to prosecution under this subchapter for promoting or possessing with intent to promote any obscene motion picture if the employee is acting within the scope of his or her regular employment.

(b)(1) As used in subsection (a) of this section, “employee” means any person regularly employed by an owner or operator of a motion picture theater if the person:

(A) Has no financial interest other than salary or wages in the ownership or operation of the motion picture theater;

(B) Has no financial interest in or control over the selection of a motion picture shown in the theater; and

(C) Is working within the motion picture theater where he or she is regularly employed.

(2) However, “employee” does not include a manager of a motion picture theater.

(c) No employee, director, or trustee of a bona fide school, museum, or public library, acting within the scope of his or her regular employment, is liable to prosecution for a violation of this subchapter for disseminating a writing, film, slide, drawing, or other visual reproduction that is claimed to be obscene.

**History.** Acts 1981 (1st Ex. Sess.), No. 28, § 8; A.S.A. 1947, § 41-3585.7.

CASE NOTES

ANALYSIS

**Constitutionality.**  
Bona Fide School, Museum, or Public Library.

**Constitutionality.**  
Subsection (c) of this section does not deny equal protection because bookstore employees do not enjoy the same immunity from prosecution that is granted to the employees of schools, museums, and libraries. 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190 (1986).  
The statutory exemption under subsections (a) and (b) of this section in favor of theater employees is valid and does not

violate the equal protection clause even though employees of bookstores are not exempted. 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190 (1986).  
**Bona Fide School, Museum, or Public Library.**  
The settled meaning of “bona fide” as synonymous with its literal translation, “good faith,” is so familiar that the average person could not be misled; therefore, subsection (c) of this section is not overbroad because the exact meaning of bona fide is not given. 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190 (1986).  
**Cited:** Dunlap v. State, 303 Ark. 222, 795 S.W.2d 920 (1990).

SUBCHAPTER 4 — ARKANSAS LAW ON OBSCENITY

SECTION.  
5-68-401. Title.  
5-68-402. Purpose and intent.  
5-68-403. Definitions.  
5-68-404. Mailable matter subject to provisions of subchapter.  
5-68-405. Possession, sale, or distribution.  
5-68-406. Action to determine obscenity.  
5-68-407. Complaint.  
5-68-408. Order to show cause.  
5-68-409. Answer — Trial date.

SECTION.  
5-68-410. Trial procedure.  
5-68-411. Judgment — Enforcement.  
5-68-412. Injunctions.  
5-68-413. Contempt.  
5-68-414. Extradition.  
5-68-415. Possession of things enumerated in § 5-68-405 creates a presumption.  
5-68-416. Nonresidents subject to jurisdiction.

**Publisher’s Notes.** This subchapter may be partially superseded by §§ 5-68-301 — 5-68-308.

RESEARCH REFERENCES

**Ark. L. Rev.** Legislation — No. 261 — Obscene Materials — Circulation Enjoined — Possession Penalized, 15 Ark. L. Rev. 438.  
The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.  
**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.  
DeSimone, Survey of Criminal Law, 3 U. Ark. Little Rock L.J. 191.

CASE NOTES

**Constitutionality.**  
The distribution of books and magazines, even though obscene, is protected

by the First and Fourteenth Amendments to the Constitution of the United States from governmental suppression, whether



criminal or civil, in personam or in rem. *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967).

There is no statutory authority in this subchapter authorizing a prospective injunction against allegedly obscene mate-

rial not described in the complaint and not being promoted, displayed or possessed by the petitioners when the action is filed. *Brown v. Kimbrough*, 263 Ark. 913, 568 S.W.2d 226 (1978).

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### 5-68-401. Title.

This subchapter shall be known as the “Arkansas Law on Obscenity” and may be referred to by that designation.

**History.** Acts 1961, No. 261, § 1; A.S.A. 1947, § 41-3562.

### 5-68-402. Purpose and intent.

(a) The General Assembly determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this state.

(b) The elimination of this evil and the consequent protection of the citizens and residents of this state against those publications are in the best interests of the morals and general welfare of the people.

(c) The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach nonresidents responsible for the composition, publication, and distribution of obscene publications within the state.

**History.** Acts 1961, No. 261, § 2; A.S.A. 1947, § 41-3563.

### 5-68-403. Definitions.

As used in this subchapter:

(1) “Mailable matter” means:

(A) Printed or written matter or material having second-class mailing privileges under the laws of the United States; or

(B) Any other printed or written matter or material that has not been determined to be nonmailable under the laws of the United States;

(2) “Obscene” means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest;

(3) “Person” means any individual, partnership, firm, association, corporation, or other legal entity; and

(4)(A) “Printed or written matter or material” means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper, or other printed or written matter.

(B) "Printed or written matter or material" does not include written or printed matter or material used by or in any recognized religious, scientific, or educational institution.

**History.** Acts 1961, No. 261, § 3; A.S.A. 1947, § 41-3564.

#### **5-68-404. Mailable matter subject to provisions of subchapter.**

Any mailable matter that is sent or caused to be sent, brought, or caused to be brought into this state for sale or commercial distribution or that in this state is sold, exhibited or commercially distributed, given away, or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any person with knowledge of the judgment with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of § 5-68-405.

**History.** Acts 1961, No. 261, § 12; A.S.A. 1947, § 41-3573.

#### **5-68-405. Possession, sale, or distribution.**

(a) Any person that, with knowledge of its contents, sends or causes to be sent or brings or causes to be brought into this state for sale or commercial distribution, or in this state prepares, publishes, sells, exhibits, or commercially distributes, or gives away or offers to give away or has in the person's possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material other than mailable matter, or any mailable matter known by the person to have been judicially found to be obscene under this subchapter, or that knowingly informs another of when, where, how, or from whom or by what means any of these things can be purchased or obtained, is guilty of a Class D felony.

(b) Any person that, with knowledge of its contents, has in the person's possession any obscene printed or written matter or material other than mailable matter, or any mailable matter known by that person to have been judicially found to be obscene under this subchapter, is guilty of a Class A misdemeanor.

**History.** Acts 1961, No. 261, § 4; A.S.A. 1947, § 41-3565; Acts 2005, No. 1994, § 430.

#### **RESEARCH REFERENCES**

**ALR.** Constitutionality of state statutes banning distribution of sexual devices. 94 A.L.R.5th 497.

**CASE NOTES**

**Cited:** Brown v. Kimbrough, 263 Ark. 913, 568 S.W.2d 226 (1978).

**5-68-406. Action to determine obscenity.**

The prosecuting attorney for the county where obscene mailable matter is sent or caused to be sent, brought, or caused to be brought or where it is prepared, sold, exhibited or commercially distributed, or given away or offered to be given away or possessed shall institute an action in the circuit court for that county for an adjudication of the obscenity of the mailable matter if the prosecuting attorney has reasonable cause to believe that any person with knowledge of its contents is:

(1) Engaged in sending obscene mailable matter, causing it to be sent, bringing or causing it to be brought, into this state for sale or commercial distribution; or

(2) In this state preparing, selling, exhibiting or commercially distributing obscene mailable matter, giving it away, offering to give it away, or has it in the person's possession with intent to sell, commercially distribute, exhibit, give it away, or offer to give it away.

**History.** Acts 1961, No. 261, § 5; A.S.A. 1947, § 41-3566.

**5-68-407. Complaint.**

(a) The action authorized in § 5-68-406 is commenced by the filing of a complaint to which is attached as an exhibit a true copy of the allegedly obscene mailable matter.

(b) The complaint shall:

(1) Be directed against the mailable matter by name or description;

(2) Allege the mailable matter's obscene nature;

(3) Designate as respondents and list the names and addresses, if known, of the mailable matter's author, publisher, and any other person sending or causing it to be sent, bringing, or causing it to be brought into this state for sale or commercial distribution and of any person in this state preparing, selling, exhibiting, or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(4) Pray for an adjudication that the mailable matter is obscene;

(5) Pray for a permanent injunction against any person sending or causing the mailable matter to be sent, bringing, or causing it to be brought into this state for sale or commercial distribution, or in this state preparing, selling, exhibiting, or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away; and



(6) Pray for the mailable matter's surrender, seizure, and destruction.

**History.** Acts 1961, No. 261, § 6; A.S.A. 1947, § 41-3567.

#### CASE NOTES

**Cited:** *Brown v. Kimbrough*, 263 Ark. 913, 568 S.W.2d 226 (1978).

#### **5-68-408. Order to show cause.**

(a) Upon the filing of the complaint described in § 5-68-407, the prosecuting attorney shall present the complaint, including the exhibit to the complaint, as soon as practicable to the circuit court for its examination.

(b) If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the circuit court shall dismiss the complaint.

(c) If the circuit court finds probable cause to believe the mailable matter to be obscene, it shall issue an order to show cause why the mailable matter shall not be adjudicated obscene, returnable not less than ten (10) days after the order's service, directed against the mailable matter by name or description and directing the service of a copy of the order, together with a copy of the complaint upon the mailable matter and upon each of the respondents named in the complaint.

(d) Service of the order shall be made upon the mailable matter at its place of publication or its editorial offices as shown in the order.

(e) Service of the order or any copy of the order may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any nonresident respondent, by registered or certified mail directed to the mailable matter of the respondent to be served at the address shown in the complaint.

(f) Proof of the mailing is deemed to be prima facie evidence of service of the order or a copy of the order upon the mailable matter or any respondent for the purposes of this section.

**History.** Acts 1961, No. 261, § 7; A.S.A. 1947, § 41-3568.

#### **5-68-409. Answer — Trial date.**

(a) On or before the return date specified in the order to show cause, the mailable matter and each respondent may file an answer or other defense.

(b) By order, the circuit court may permit any person to appear and file an answer as *amicus curiae*.

(c) If no person files an answer or other defense on or before the return date specified in the order to show cause, the circuit court may

immediately determine whether theailable matter is obscene and enter an appropriate judgment.

(d) Upon the expiration of the time for filing an answer or other defense by theailable matter and all respondents, and, upon the circuit court's own motion or upon the application of any party, the circuit court may set a date for the trial of the issues joined.

**History.** Acts 1961, No. 261, § 8; A.S.A. 1947, § 41-3569.

### **5-68-410. Trial procedure.**

(a) The public interest requires that any action prescribed in this subchapter, other than a criminal action under § 5-68-405, be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press, and freedom of speech.

(b) The rules of civil procedure pertaining to equity cases are applicable to the trial of an action prescribed in this subchapter, other than a criminal action under § 5-68-405.

**History.** Acts 1961, No. 261, § 9; A.S.A. 1947, § 41-3570.

### **5-68-411. Judgment — Enforcement.**

If the circuit court finds theailable matter to be obscene, it shall enter judgment to that effect and may, in the judgment or in a subsequent order of enforcement of the judgment:

(1) Enter a permanent injunction against any respondent prohibiting the respondent from doing or continuing to do any act condemned by this subchapter;

(2) Direct any resident respondent to dispose of any obsceneailable matter in the resident respondent's possession or under the resident respondent's control under such conditions and within such time as the circuit court may find to be reasonable; or

(3) If any respondent fails to comply with an order of the circuit court, direct any sheriff in the state to seize and destroy any obsceneailable matter in the possession or under the control of the respondent wherever the obsceneailable matter may be found.

**History.** Acts 1961, No. 261, § 10; A.S.A. 1947, § 41-3571.

### **CASE NOTES**

**Cited:** Brown v. Kimbrough, 263 Ark. 913, 568 S.W.2d 226 (1978).

**5-68-412. Injunctions.**

- (a) Any order granting an injunction shall:
- (1) Set forth the reasons for its issuance;
  - (2) Be specific in terms;
  - (3) Describe in reasonable detail, and not by reference to the complaint or other document, the act sought to be restrained; and
  - (4) Be binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation by contract or arrangement with the respondents that receive actual notice of the order by personal service or otherwise.
- (b) A copy of any order of the circuit court in finding any matter to be obscene and any order of injunction issued in regard to the matter shall be served upon all persons, and in the same manner, as is provided in § 5-68-408.

**History.** Acts 1961, No. 261, § 11;  
A.S.A. 1947, § 41-3572.

**CASE NOTES**

**Cited:** *Brown v. Kimbrough*, 263 Ark.  
913, 568 S.W.2d 226 (1978).

**5-68-413. Contempt.**

Any respondent or any officer, agent, servant, employee, or attorney of the respondent or any person in active concert or participation by contract or arrangement with the respondent, that receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to § 5-68-412 and that disobeys any provision of the injunction or restraining order is guilty of contempt of court.

**History.** Acts 1961, No. 261, § 13;  
A.S.A. 1947, § 41-3574.

**5-68-414. Extradition.**

In any case in which a circuit court has entered its judgment, pursuant to § 5-68-411, that theailable matter in question is obscene, and a charge of continuing violation is brought against a person that, being a respondent to the judgment, cannot be found in this state, the Governor shall demand the person's extradition from the executive authority of the state where the person may be found pursuant to the laws of this state unless the person has appealed from the judgment and the appeal has not been finally determined.

**History.** Acts 1961, No. 261, § 14;  
A.S.A. 1947, § 41-3575.



**5-68-415. Possession of things enumerated in § 5-68-405 creates a presumption.**

(a)(1) The possession of any three (3) of the things enumerated in § 5-68-405, except the possession of them for the purpose of return to the person from whom received, creates a presumption that the things are intended for sale or commercial distribution, exhibition, or gift.

(2) However, the presumption under subdivision (a)(1) of this section is rebuttable.

(b) The burden of proof that the possession of the things is for the purpose of return to the person from whom received is on the possessor.

**History.** Acts 1961, No. 261, § 15;  
A.S.A. 1947, § 41-3576.

**5-68-416. Nonresidents subject to jurisdiction.**

In order to protect the morals and general welfare of the citizens and residents of this state against obscene printed or written matter or material originating outside this state, it is the purpose of this section to subject to the jurisdiction of the courts of this state those persons that are responsible for the importation of obscene printed or written matter or material into this state and, by that act, submit themselves to the jurisdiction of the courts of this state in any action authorized by § 5-68-406.

**History.** Acts 1961, No. 261, § 16;  
A.S.A. 1947, § 41-3577.

**SUBCHAPTER 5 — SELLING OR LOANING PORNOGRAPHY TO MINORS**

SECTION.

5-68-501. Definitions.

5-68-502. Selling, loaning, or displaying

SECTION.

pornography to minors.

5-68-503. [Repealed.]

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**CASE NOTES**

**Cited:** Fortner v. State, 258 Ark. 591,  
528 S.W.2d 378 (1975).

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**5-68-501. Definitions.**

As used in this subchapter:

(1) “CD-ROM” means a compact disk that:

(A) Has the capacity to store graphic, audio, video, and written material; and

(B) May be used by a computer or other device to play or display material harmful to minors;

(2) "Harmful to minors" means that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when the material or performance, taken as a whole, has the following characteristics:

(A) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors;

(B) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

(C) The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors;

(3) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief that warrants further inspection or inquiry of both:

(A) The character and content of any material described in this section that is reasonably susceptible to examination by the defendant; and

(B)(i) The age of the minor.

(ii) However, an honest mistake constitutes an excuse from liability under this section if the defendant made a reasonable bona fide attempt to ascertain the age of the minor;

(4) "Magnetic disk memory" means a memory system that stores and retrieves binary data on a record-like metal or plastic disk coated with a magnetic material, including, but not limited to, a hard disk drive and a floppy diskette;

(5) "Magnetic tape memory" means a memory system that stores and retrieves binary data on magnetic recording tape;

(6)(A) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture, film, record, recording tape, CD-ROM disk, magnetic disk memory, magnetic tape memory, video tape, or other media.

(B) However, "material" does not include a matter displayed, transmitted, retrieved, or stored on the Internet or other network for the electronic dissemination of information;

(7) "Minor" means any person under eighteen (18) years of age;

(8) "Nudity" means a:

(A) Showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;

(B) Showing of the female breast with less than a fully opaque covering of any portion of the female breast below the top of the nipple; or

(C) Depiction of covered male genitals in a discernibly turgid state;  
 (9)(A) “Performance” means any motion picture, film, video tape, played record, phonograph or tape, preview, trailer, play, show, skit, dance, or other exhibition performed or presented to or before an audience of one (1) or more, with or without consideration.

(B) However, “performance” does not include a matter displayed, transmitted, retrieved, or stored on the Internet or other network for electronic dissemination of information;

(10) “Person” means any individual, partnership, association, corporation, or other legal entity of any kind;

(11) “Reasonable bona fide attempt” means an attempt to ascertain the true age of a minor by requiring production of a driver’s license, marriage license, birth certificate, or other governmental or educational identification card or paper and not relying solely on an oral allegation or apparent age of the minor;

(12) “Sodomasochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask, or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of a person so clothed;

(13) “Sexual conduct” means an act of masturbation, homosexuality, sexual intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or female breast; and

(14) “Sexual excitement” means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

**History.** Acts 1969, No. 133, § 1; A.S.A. 1947, § 41-3581; Acts 1999, No. 1263, § 1.

## CASE NOTES

### ANALYSIS

Constitutionality.  
 Construction.

#### Constitutionality.

Based upon responses from questions certified to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 6-8, a federal district court found that § 5-68-502 effectively stifled the access of adults and older minors to communications and material they were entitled to receive and view under U.S. Const. amends. I and XIV. *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819 (E.D. Ark. 2004) (decided under former version of § 5-68-502).

### Construction.

In response to certified questions from the federal district court, the state Supreme Court determined that all minors had to be protected from material that was deemed to be harmful to minors; specifically, this material had to be obstructed from view and physically segregated for librarians and booksellers to avoid prosecution. *Shipley, Inc. v. Long*, 359 Ark. 208, 195 S.W.3d 911 (2004).

**Cited:** *State v. Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979).



## 5-68-502. Selling, loaning, or displaying pornography to minors.

(a) It is unlawful for any person, including without limitation any person having custody, control, or supervision of any commercial establishment, to knowingly:

(1)(A) Display material that is harmful to minors in such a way that the material is exposed to the view of a minor as part of the invited general public.

(B) However, a person is deemed not to have displayed material harmful to minors if:

(i) The material is kept behind devices commonly known as “blinder racks” so that the lower two-thirds (2/3) of the material is not exposed to view; or

(ii) Material harmful to minors is not contained on the front cover, back cover, or binding of the displayed material;

(2)(A) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor with or without consideration any material that is harmful to minors.

(B) However, the prohibition under subdivision (a)(2)(A) of this section does not apply to any dissemination:

(i) By a parent, guardian, or relative within the third degree of consanguinity of the minor; or

(ii) With the consent of a parent or guardian of the minor; or

(3)(A) Present to a minor or participate in presenting to a minor with or without consideration any performance that is harmful to minors.

(B) However, the prohibition under subdivision (a)(3)(A) of this section does not apply to any dissemination:

(i) By a parent, guardian, or relative within the third degree of consanguinity to the minor; or

(ii) With the consent of a parent or guardian of the minor.

(b) A violation of subsection (a) of this section is a Class B misdemeanor.

**History.** Acts 1969, No. 133, § 2; A.S.A. 1947, § 41-3582; Acts 1999, No. 1263, § 2; 2003, No. 858, § 1; 2007, No. 579, § 1; 2015, No. 1263, § 19.

**Amendments.** The 2015 amendment rewrote the section heading; inserted designation (a); in the introductory language

of (a), substituted “without limitation” for “but not limited to”; substituted “(a)(2)(A)” for “(2)(A)” in (a)(2)(B); substituted “degree of” for “degree or” in (a)(2)(B)(i); substituted “(a)(3)(A)” for “(3)(A)” in (a)(3)(B); and added (b).

## CASE NOTES

### ANALYSIS

Constitutionality.  
Construction.

### Constitutionality.

Based upon responses from questions certified to the Arkansas Supreme Court

pursuant to Ark. Sup. Ct. R. 6-8, a federal district court found that this section effectively stifled the access of adults and older minors to communications and material they were entitled to receive and view under U.S. Const. amends. I and XIV. *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819 (E.D. Ark. 2004) (decided under former

version of statute).

**Construction.**

In response to certified questions from the federal district court, the state Supreme Court determined that all minors had to be protected from material that was deemed to be harmful to minors; specifically, this material had to be obstructed from view and physically segregated for librarians and booksellers to avoid prosecution. *Shipley, Inc. v. Long*, 359 Ark. 208, 195 S.W.3d 911 (2004).

The “safe harbor” provision of this sec-

tion requires only that some physical obstacle stand between minors and the area where prohibited material is displayed so that minors have no access to such material; although booksellers may choose the method best suited to their individual establishments, it remains for the federal court to ultimately determine whether such a requirement violates the First Amendment rights of booksellers, librarians, and their adult customers. *Shipley, Inc. v. Long*, 359 Ark. 208, 195 S.W.3d 911 (2004).

**5-68-503. [Repealed.]**

**Publisher’s Notes.** This section, concerning penalties, was repealed by Acts 2015, No. 1263, § 20. The section was

derived from Acts 1969, No. 133, § 3; A.S.A. 1947, § 41-3583; Acts 2005, No. 1994, § 382.

**CHAPTER 69**

**OIL AND GAS**

SECTION.

5-69-101. Extension of gas pipe without permission.

5-69-102. Carbon black.

SECTION.

5-69-103. Pipelines and pipeline facilities.

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**Effective Dates.** Acts 1905, No. 242, § 6: effective on passage.

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**5-69-101. Extension of gas pipe without permission.**

(a) It is declared to be unlawful for any person in any manner to change, extend, or alter, or to cause to be changed, extended, or altered, any service or other pipe or attachment of any kind, by or through which natural or artificial gas is furnished from the gas mains or pipes of any person, company, or corporation without first securing from that person, company, or corporation written permission to make the change, extension, or alteration.

(b) Any person violating any provision of subsection (a) of this section upon conviction is guilty of a Class A misdemeanor.

**History.** Acts 1905, No. 242, §§ 4, 5, p. 635; C. & M. Dig., §§ 2481, 2482; Pope’s

Dig., §§ 3120, 3121; A.S.A. 1947, §§ 41-3651, 41-3652; Acts 2005, No. 1994, § 467.

**5-69-102. Carbon black.**

(a) The use of natural gas within the State of Arkansas for the purpose of obtaining the carbon black content by the process of burning is prohibited.

(b) The erection, enlargement, maintenance, and operation of any plant in the State of Arkansas for the purpose of burning natural gas to obtain from the natural gas the carbon black content is prohibited within this state.

(c) No person, firm, or corporation owning or operating any gas well within this state shall:

(1) Use any part of the gas produced from the gas well for the purpose of obtaining the carbon black content of the gas by the process of burning; or

(2) Sell or deliver any part of the gas produced from the gas well to any other person, firm, or corporation for use by that person, firm, or corporation in obtaining the carbon black content of the gas by the process of burning the gas.

(d)(1) The erection, maintenance, or operation of any carbon black plant in violation of this section or the use, sale, or delivery of any natural gas from any gas well in this state in violation of a provision of this section is declared a public nuisance.

(2) The Attorney General and the several prosecuting attorneys of this state shall proceed in the name of the State of Arkansas in any court of competent jurisdiction by injunction, mandamus, or other appropriate remedy for the abatement of a public nuisance under subdivision (d)(1) of this section.

(e)(1) Any person, firm, or corporation violating any provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000).

(2) Each day that any plant is operated for the purpose of manufacturing carbon black or each day that any gas is used, sold, or delivered from any gas well in violation of a provision of this section is deemed a separate offense.

(f) Nothing in this section shall be construed as prohibiting the use of casing-head gas, produced from any oil well, in the manufacture of carbon black.

**History.** Acts 1925, No. 350, §§ 1-6; §§ 41-3653 — 41-3658; Acts 2005, No. Pope's Dig., §§ 3122-3127; A.S.A. 1947, 1994, § 56; 2007, No. 827, § 91.

**5-69-103. Pipelines and pipeline facilities.**

(a) A person upon conviction is guilty of a Class D felony if the person knowingly violates:

(1) Section 14-271-110(a);

(2) An order, safety standard, rule, or regulation of the Arkansas Public Service Commission pursuant to § 23-15-205;

(3) Section 23-15-206(b);



- (4) Section 23-15-206(c);
- (5) Section 23-15-208(a); or
- (6) Section 23-15-209(a).

(b) A person upon conviction is guilty of a Class D felony if the person knowingly violates § 14-271-112(a) and:

(1) With respect to the violation, damages or destroys an interstate or intrastate natural gas pipeline facility that results in serious physical injury or actual damage to property of more than fifty thousand dollars (\$50,000);

(2) With respect to the violation, damages or destroys an interstate or intrastate natural gas pipeline facility, knows or has reason to know of the damage or destruction, and does not report the damage or destruction promptly to the operator of the interstate or intrastate natural gas pipeline facility or to local law enforcement authorities; or

(3) With respect to the violation, damages an intrastate hazardous liquid pipeline facility that results in the release of more than fifty (50) barrels of hazardous liquid.

(c)(1) A person who knowingly engages in the unauthorized disposal of solid waste within the right-of-way of an interstate or intrastate pipeline facility or an interstate or intrastate hazardous liquid pipeline facility upon conviction is guilty of a Class D felony.

(2)(A) As used in this subsection, “solid waste” means garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including without limitation solid, liquid, semisolid, or contained gaseous material resulting from industrial operations, commercial operations, mining operations, agricultural operations, or other community activities.

(B) “Solid waste” does not include solid or dissolved material in domestic sewage or solids discovered in materials in irrigation return flows or industrial discharges that are point sources subject to permits under 33 U.S.C. § 1342, as it existed on January 1, 2013, or source, special nuclear, or byproduct material as defined by 42 U.S.C. § 2011 et seq., as it existed on January 1, 2013.

(d) A person who knowingly damages or destroys an interstate or intrastate pipeline facility or an interstate or intrastate hazardous liquid pipeline facility upon conviction is guilty of a:

(1) Class A misdemeanor if the amount of actual damage is one thousand dollars (\$1,000) or less;

(2) Class D felony if the amount of actual damage is more than one thousand dollars (\$1,000) but less than five thousand dollars (\$5,000);

(3) Class C felony if the amount of actual damage is more than five thousand dollars (\$5,000) but less than twenty-five thousand dollars (\$25,000); or

(4) Class B felony if the amount of actual damage is more than twenty-five thousand dollars (\$25,000).

(e) A person who knowingly tampers with, damages, or destroys a pipeline sign or right-of-way marker required by law or rule of the state upon conviction is guilty of a:

- (1) Class A misdemeanor if the amount of actual damage is one thousand dollars (\$1,000) or less;
- (2) Class D felony if the amount of actual damage is more than one thousand dollars (\$1,000) but less than five thousand dollars (\$5,000);
- (3) Class C felony if the amount of actual damage is more than five thousand dollars (\$5,000) but less than twenty-five thousand dollars (\$25,000); or
- (4) Class B felony if the amount of actual damage is more than twenty-five thousand dollars (\$25,000).

**History.** Acts 2013, No. 1343, § 4; 207(b), this section is set out as enacted by 2013, No. 1344, § 5.  
**A.C.R.C. Notes.** Pursuant to § 1-2-

CHAPTER 70

PROSTITUTION

SECTION.	SECTION.
5-70-101. Definitions.	5-70-105. Promoting prostitution in the second degree.
5-70-102. Prostitution.	5-70-106. Promoting prostitution in the third degree.
5-70-103. Sexual solicitation.	
5-70-104. Promoting prostitution in the first degree.	

**Cross References.** Fines, § 5-4-201.  
House of ill fame, abatement as nuisance, § 20-27-401.  
Municipalities may regulate or suppress houses of ill fame, § 14-54-103.  
Sexual offenses, § 5-14-101 et seq.  
Term of imprisonment, § 5-4-401.

**Effective Dates.** Acts 1981, No. 816, § 3: Mar. 28, 1981. Emergency clause provided: “It is hereby found and determined by the General Assembly that the existing

penalties for persons engaged in acts of prostitution do not constitute a sufficient deterrent to further violation of the statutes and that increased penalties for such acts can provide such a deterrent. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

**ALR.** Entrapment defense in sex offense prosecutions. 12 A.L.R.4th 413.  
**Am. Jur.** 63C Am. Jur. 2d, Prostitution, § 1 et seq.

**C.J.S.** 73 C.J.S., Prostitution, § 1 et seq.  
**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Criminal Law, 4 U. Ark. Little Rock L.J. 189.

5-70-101. Definitions.

As used in this chapter:

(1) “Advances prostitution” means a person if, acting other than as a prostitute or a patron of a prostitute, that person knowingly:

(A) Causes or aids a person to commit or engage in prostitution;

(B) Procures or solicits a patron for prostitution;

(C) Provides a person or premises for prostitution purposes;

(D) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(E) Engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution;

(2) “Physical force” means any bodily impact, restraint, or confinement or the threat of bodily impact, restraint, or confinement;

(3) “Profits from prostitution” means a person if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, the person accepts or receives money or other property pursuant to an agreement or understanding with any person in which the person participates or is to participate in the proceeds of prostitution; and

(4) “Sexual activity” means sexual intercourse, deviate sexual activity, or sexual contact as defined in § 5-14-101.

**History.** Acts 1975, No. 280, § 3001; A.S.A. 1947, § 41-3001.

### CASE NOTES

#### **Sexual Activity.**

Where defendant advertised “erotic services” on the Internet, she met an undercover officer at a hotel, and stroked his penis during the course of performing a massage; the officer’s testimony was sufficient to meet the requirements of this

section for showing sexual activity through sexual contact. Defendant was properly convicted of prostitution under § 5-70-102, and sentenced to non-reporting probation for six months. *Arrigo v. State*, 2009 Ark. App. 568, 337 S.W.3d 560 (2009).

#### **5-70-102. Prostitution.**

(a) A person commits prostitution if in return for or in expectation of a fee he or she engages in or agrees or offers to engage in sexual activity with any other person.

(b) Prostitution is a:

(1) Class B misdemeanor for the first offense; and

(2) Class A misdemeanor for a second or subsequent offense under this section.

(c) It is an affirmative defense to prosecution that the person engaged in an act of prostitution as a result of being a victim of trafficking of persons, § 5-18-103.

(d) In addition to any other sentence authorized by this section, a person who violates this section by offering to pay, agreeing to pay, or paying a fee to engage in sexual activity upon conviction shall be ordered to pay a fine of two hundred fifty dollars (\$250) to be deposited into the Safe Harbor Fund for Sexually Exploited Children.

**History.** Acts 1975, No. 280, § 3002; 132, § 4; 2013, No. 133, § 4; 2013, No. 1981, No. 816, § 1; 1983, No. 414, § 1; 1257, § 5.  
A.S.A. 1947, § 41-3002; Acts 2013, No. **A.C.R.C. Notes.** Acts 2013, No. 133,



§ 1, provided: “This act shall be cited as the ‘Arkansas Human Trafficking Act of 2013’.”

Acts 2013, No. 1257, § 1, provided: “Legislative findings.

“The General Assembly finds that:

“(1) The criminal justice system is not the appropriate place for sexually exploited children because it serves to re-traumatize them and to increase their feelings of low self-esteem;

“(2) Both federal and international law recognize that sexually exploited children are the victims of crime and should be treated as such;

“(3) Sexually exploited children should, when possible, be diverted into services that address the needs of these children outside of the justice system; and

“(4) Sexually exploited children deserve the protection of child welfare services, including diversion, crisis intervention, counseling, and emergency housing services.”

Acts 2013, No. 1257, § 2, provided: “Legislative intent.

“(1) The intent of this act is to protect a child from further victimization after the child is discovered to be a sexually exploited child by ensuring that a child protective response is in place in the state.

“(2) This is to be accomplished by pre-

suming that any child engaged in prostitution or solicitation is a victim of sex trafficking and providing these children with the appropriate care and services when possible.

“(3) In determining the need for and capacity of services that may be provided, the Department of Human Services shall recognize that sexually exploited children have separate and distinct service needs according to gender, and every effort should be made to ensure that these children are not prosecuted or treated as juvenile delinquents, but instead are given the appropriate social services.”

**Amendments.** The 2013 amendment by identical acts Nos. 132 and 133 substituted “a second or subsequent offense under this section” for “second and subsequent offenses” in (b)(2); and added (c).

The 2013 amendment by No. 1257 added (d).

**Cross References.** Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies, § 5-74-109.

Municipal corporations’ powers and restrictions, § 14-54-102.

Criminal nuisance abatement boards, § 14-54-1701 et seq.

Common nuisance declared, § 16-105-402.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Notes, Wrongful Discharge — Sexual Harassment Equated With Prostitution to Find Public Policy Exception, 8 U. Ark. Little Rock L.J. 49.

Note, Labor — Employment at Will — Public Policy Exception Recognized, *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743

S.W.2d 380 (1988), 11 U. Ark. Little Rock L.J. 617.

**U. Ark. Little Rock L. Rev.** Mary Ward, Note: Arkansas’s Human Trafficking Laws: Steps in the Right Direction or a False Sense of Accomplishment?, 37 U. Ark. Little Rock L. Rev. 133 (2014).

## CASE NOTES

### Sufficient Evidence.

Where defendant advertised “erotic services” on the Internet, she met an undercover officer at a hotel, and stroked his penis during the course of performing a massage; the officer’s testimony was sufficient to show sexual activity through sexual contact as defined by § 5-14-101.

Defendant was properly convicted of prostitution in violation of this section, and sentenced to non-reporting probation for six months. *Arrigo v. State*, 2009 Ark. App. 568, 337 S.W.3d 560 (2009).

**Cited:** *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984).

**5-70-103. Sexual solicitation.**

(a) A person commits the offense of sexual solicitation if he or she:

(1) Offers or agrees to pay a fee to a person to engage in sexual activity with him or her or another person; or

(2) Solicits or requests a person to engage in sexual activity with him or her in return for a fee.

(b) Sexual solicitation is a:

(1) Class B misdemeanor for the first offense; and

(2) Class A misdemeanor for a second or subsequent offense.

(c) It is an affirmative defense to prosecution under this section that the person engaged in an act of sexual solicitation as a result of being a victim of trafficking of persons, § 5-18-103.

(d) In addition to any other sentence authorized by this section, a person who violates this section by offering to pay, agreeing to pay, or paying a fee to engage in sexual activity upon conviction shall be ordered to pay a fine of two hundred fifty dollars (\$250) to be deposited into the Safe Harbor Fund for Sexually Exploited Children.

**History.** Acts 1975, No. 280, § 3003; A.S.A. 1947, § 41-3003; Acts 1999, No. 591, § 1; 2009, No. 428, § 1; 2013, No. 132, § 5; 2013, No. 133, § 5; 2013, No. 1157, § 4; 2013, No. 1257, § 6.

**A.C.R.C. Notes.** Acts 2013, No. 133, § 1, provided: "This act shall be cited as the 'Arkansas Human Trafficking Act of 2013'."

Acts 2013, No. 1257, § 1, provided: "Legislative findings.

"The General Assembly finds that:

"(1) The criminal justice system is not the appropriate place for sexually exploited children because it serves to re-traumatize them and to increase their feelings of low self-esteem;

"(2) Both federal and international law recognize that sexually exploited children are the victims of crime and should be treated as such;

"(3) Sexually exploited children should, when possible, be diverted into services that address the needs of these children outside of the justice system; and

"(4) Sexually exploited children deserve the protection of child welfare services, including diversion, crisis intervention, counseling, and emergency housing services."

Acts 2013, No. 1257, § 2, provided:

"Legislative intent.

"(1) The intent of this act is to protect a child from further victimization after the child is discovered to be a sexually exploited child by ensuring that a child protective response is in place in the state.

"(2) This is to be accomplished by presuming that any child engaged in prostitution or solicitation is a victim of sex trafficking and providing these children with the appropriate care and services when possible.

"(3) In determining the need for and capacity of services that may be provided, the Department of Human Services shall recognize that sexually exploited children have separate and distinct service needs according to gender, and every effort should be made to ensure that these children are not prosecuted or treated as juvenile delinquents, but instead are given the appropriate social services."

**Amendments.** The 2013 amendment by identical acts Nos. 132 and 133 substituted "a second or subsequent offense" for "the second and subsequent offenses" in (b)(2); and added (c).

The 2013 amendment by No. 1157 inserted "or agrees" in (a)(1).

The 2013 amendment by No. 1257 added (d).

RESEARCH REFERENCES

**Ark. L. Rev.** The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

**U. Ark. Little Rock L. Rev.** Mary Ward, Note: Arkansas’s Human Trafficking Laws: Steps in the Right Direction or a False Sense of Accomplishment?, 37 U. Ark. Little Rock L. Rev. 133 (2014).

5-70-104. Promoting prostitution in the first degree.

- (a) A person commits the offense of promoting prostitution in the first degree if he or she knowingly:
- (1) Advances prostitution by compelling a person by physical force or intimidation to engage in prostitution or profits from such coercive conduct by another; or

(2) Advances prostitution or profits from prostitution of a person less than eighteen (18) years of age.
- (b) Promoting prostitution in the first degree is a Class D felony.

**History.** Acts 1975, No. 280, § 3004; A.S.A. 1947, § 41-3004.

CASE NOTES

ANALYSIS

Evidence.  
Force or Intimidation.  
Instructions.  
Prior Conduct as Prostitute.

**Evidence.**

Evidence held sufficient to support convictions. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

Evidence was sufficient to support defendant’s conviction of promoting prostitution in the first degree under this section where the State presented substantial evidence of circumstances through the testimony of the four witnesses from which the circuit court could infer that defendant knowingly advanced or profited from the prostitution of a person less than 18 years of age. *Tatum v. State*, 2014 Ark. App. 68 (2014).

**Force or Intimidation.**

In prosecution against two defendants for promoting prostitution, it was not necessary that both defendants used physical force or intimidation in order to be guilty of the charge; if either of the defendants

used force or intimidation and both profited from such conduct, then both were guilty of the offense charged. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

**Instructions.**

In a prosecution for pandering it was held proper for the court to read former section which defined “pandering” to the jury. *Malone v. State*, 202 Ark. 796, 152 S.W.2d 1019 (1941) (decision under prior law).

**Prior Conduct as Prostitute.**

Questions relating to defendant’s prior conduct as a prostitute were properly allowed on the theory that the questions and answers went to the proposition of defendant’s present income; in such case the probative value did outweigh the prejudicial effect upon the witness’s testimony and the fact that defendant may have been engaged in prostitution herself had probative value on the question of guilt or innocence of the charge of promoting prostitution. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

**Cited:** *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).



**5-70-105. Promoting prostitution in the second degree.**

(a) A person commits the offense of promoting prostitution in the second degree if he or she knowingly advances prostitution or profits from prostitution by managing, supervising, controlling, or owning, either alone or in association with another, a house of prostitution or a prostitution enterprise involving two (2) or more prostitutes.

(b) Promoting prostitution in the second degree is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 3005;  
A.S.A. 1947, § 41-3005.

**CASE NOTES****ANALYSIS**

Consent.  
Evidence.  
Indictment.  
Instructions.  
Place of Prostitution.

**Consent.**

It was immaterial to a charge of pandering whether the female was virtuous or not, or whether she went of her own free will or not. *Boyle v. State*, 110 Ark. 318, 161 S.W. 1049 (1913) (decision under prior law).

Conviction for pandering was upheld where defendant induced another woman to resume prostitution and it was immaterial whether woman was virtuous or whether she consented to become or remain a prostitute. *Inman v. State*, 255 Ark. 197, 500 S.W.2d 82 (1973) (decision under prior law).

**Evidence.**

Where the defendant was charged with the unlawful and felonious taking of money, evidence that he received things other than money was admissible to show that the defendant was engaged in the business of receiving money and profit out of the prostitution of his wife. *Sweat v. State*, 126 Ark. 213, 190 S.W. 433 (1916) (decision under prior law).

The evidence held sufficient to sustain a conviction on charge of operating a house of prostitution. *Hicks v. State*, 213 Ark. 108, 209 S.W.2d 451 (1948) (decision under prior law).

**Indictment.**

An indictment which failed to allege that the defendant received or appropriated money without consideration from the earnings of a prostitute was defective. *Thomas v. State*, 181 Ark. 316, 25 S.W.2d 424 (1930) (decision under prior law).

**Instructions.**

In a prosecution for pandering it was held proper for the court to read former section which defined "pandering" to the jury. *Malone v. State*, 202 Ark. 796, 152 S.W.2d 1019 (1941) (decision under prior law).

Instruction which did not tell jury that defendant could be convicted only for receiving of or from a woman's prostitution, and not for her earnings, if any, from legitimate sources, was not erroneous, especially when no specific objection was made. *Melton v. State*, 212 Ark. 968, 209 S.W.2d 99 (1948) (decision under prior law).

**Place of Prostitution.**

The defense could show that the house where the female was taken was not a place of prostitution, nor a place where it was encouraged or allowed. *Boyle v. State*, 110 Ark. 318, 161 S.W. 1049 (1913) (decision under prior law).

The former section defining "pandering" was not violated by taking a woman to a thicket, unless prostitution was there practiced, encouraged or allowed, or unless men and women resorted there for illicit intercourse. *State v. Wilson*, 118 Ark. 360, 176 S.W. 311 (1915) (decision under prior law).

5-70-106. Promoting prostitution in the third degree.

(a) A person commits the offense of promoting prostitution in the third degree if:

(1) Having a possessory or proprietary interest in premises that he or she knows is being used for prostitution, the person fails to make reasonable effort to halt or abate the use for prostitution; or

(2) He or she knowingly advances prostitution or profits from prostitution.

(b) Promoting prostitution in the third degree is a Class B misdemeanor.

**History.** Acts 1975, No. 280, § 3006; A.S.A. 1947, § 41-3006.

CASE NOTES

ANALYSIS

Consent.  
Evidence.  
Indictment.  
Instructions.  
Place of Prostitution.

**Consent.**

It was immaterial to a charge of pandering whether the female was virtuous or not, or whether she went of her own free will or not. *Boyle v. State*, 110 Ark. 318, 161 S.W. 1049 (1913) (decision under prior law).

Conviction for pandering was upheld where defendant induced another woman to resume prostitution and it was immaterial whether woman was virtuous or whether she consented to become or remain a prostitute. *Inman v. State*, 255 Ark. 197, 500 S.W.2d 82 (1973) (decision under prior law).

**Evidence.**

Where the defendant was charged with the unlawful and felonious taking of money, evidence that he received things other than money was admissible to show that the defendant was engaged in the business of receiving money and profit out of the prostitution of his wife. *Sweat v. State*, 126 Ark. 213, 190 S.W. 433 (1916) (decision under prior law).

**Indictment.**

An indictment which failed to allege that the defendant received or appropriated money without consideration from

the earnings of a prostitute was defective. *Thomas v. State*, 181 Ark. 316, 25 S.W.2d 424 (1930) (decision under prior law).

**Instructions.**

In a prosecution for pandering it was held proper for the court to read former section which defined “pandering” to the jury. *Malone v. State*, 202 Ark. 796, 152 S.W.2d 1019 (1941) (decision under prior law).

Instruction which did not tell jury that appellant could be convicted only for receiving of or from a woman’s prostitution, and not for her earnings, if any, from legitimate sources, was not erroneous, especially when no specific objection was made. *Melton v. State*, 212 Ark. 968, 209 S.W.2d 99 (1948) (decision under prior law).

**Place of Prostitution.**

The defense could show that the house where the female was taken was not a place of prostitution, nor a place where it was encouraged or allowed. *Boyle v. State*, 110 Ark. 318, 161 S.W. 1049 (1913) (decision under prior law).

The former section defining “pandering” was not violated by taking a woman to a thicket, unless prostitution was there practiced, encouraged or allowed, or unless men and women resorted there for illicit intercourse. *State v. Wilson*, 118 Ark. 360, 176 S.W. 311 (1915) (decision under prior law).

**Cited:** *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).

## CHAPTER 71

### RIOTS, DISORDERLY CONDUCT, ETC.

#### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. OFFENSES GENERALLY.
3. PROMOTING CIVIL DISORDER.

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#### RESEARCH REFERENCES

**ALR.** Conduct sufficiently violent, tumultuous, forceful, aggressive, or terrorizing to establish crime of riot. 38 A.L.R.4th 648.

Prosecutions of inmates of state or local penal institutions for crime of riot. 39 A.L.R.4th 1170.

**Am. Jur.** 53A Am. Jur. 2d, Mobs, § 1 et seq.

**Ark. L. Rev.** 1976 Criminal Code-General Principles, 30 Ark. L. Rev. 111.

Disorderly Conduct and Loitering — A Modern Approach to Traditional Legislation, 30 Ark. L. Rev. 186.

**C.J.S.** 27 C.J.S., Disord. Cond., § 1 et seq.

77 C.J.S., Riot, § 1 et seq.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Criminal Law, 4 U. Ark. Little Rock L.J. 189.

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#### SUBCHAPTER 1 — GENERAL PROVISIONS

#### SECTION.

5-71-101. Definitions.

#### 5-71-101. Definitions.

As used in this chapter:

(1) "Deviate sexual activity" means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of one (1) person by the penis of another person; or

(B) The penetration, however slight, of the vagina or anus of one (1) person by any body member or foreign instrument manipulated by another person;

(2) "Governmental function" means any activity that a public servant is legally authorized to undertake on behalf of any governmental unit he or she serves;

(3) "Occupiable structure" means a vehicle, building, or other structure:

(A) Where any person lives or carries on a business or other calling;

(B) Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or

(C)(i) That is customarily used for overnight accommodation of persons, whether or not a person is actually present.



- (ii) Each unit of an occupiable structure divided into separately occupied units is itself an occupiable structure;
- (4) “Property” means real property or tangible or intangible personal property, including money or any paper or document that represents or embodies anything of value;
- (5) “Prostitution” has the meaning specified in § 5-70-102;
- (6) “Public building” means a structure owned, operated, or occupied by any agency of the State of Arkansas or its political subdivisions or by any agency of the United States Government;
- (7) “Public place” means a publicly or privately owned place to which the public or a substantial number of people have access;
- (8) “Vehicle” means any craft or device designed for the transportation of people or property across land or water or through the air; and
- (9) “Vital public facility” means a facility maintained for use for:
  - (A) Public communications;
  - (B) Transportation;
  - (C) Supply of water, gas, or power;
  - (D) Law enforcement;
  - (E) Fire protection;
  - (F) Civil or national defense; or
  - (G) Other public service.

**History.** Acts 1975, No. 280, § 2901; A.S.A. 1947, § 41-2901.

CASE NOTES

**Public Place.**

The definition of “public place” speaks only to accessibility, not visibility. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

Where defendant was attending a private party and was drinking on the tail-

gate of a pickup parked in the side yard of the residence, defendant was not drinking in a “public place” as that term is used in this section. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

**Cited:** *Giron v. City of Alexander*, 693 F. Supp. 2d 904 (E.D. Ark. 2010).

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.	SECTION.
5-71-201. Riot.	5-71-214. Obstructing a highway or other public passage.
5-71-202. Aggravated riot.	5-71-215. Defacing objects of public respect.
5-71-203. Inciting riot.	5-71-216. [Repealed.]
5-71-204. Arming rioters.	5-71-217. Cyberbullying.
5-71-205. Unlawful assembly.	5-71-218 — 5-71-224. [Reserved.]
5-71-206. Failure to disperse.	5-71-225. [Repealed.]
5-71-207. Disorderly conduct.	5-71-226. Disruption of campus activities.
5-71-208. Harassment.	5-71-227. [Repealed.]
5-71-209. Harassing communications.	5-71-228. Obstruction of shooting, hunting, fishing, or trapping activities.
5-71-210. Communicating a false alarm.	
5-71-211. Threatening a fire or bombing.	
5-71-212. Public intoxication — Drinking in public.	
5-71-213. Loitering.	

## SECTION.

5-71-229. Stalking.

5-71-230. Violation of the protection of  
peace for mourning at a  
funeral.**Cross References.** Fines, § 5-4-201.

Riotous and unlawful assemblies, dispersal, §§ 12-11-102 and 12-11-103.

Term of imprisonment, § 5-4-401.

**Preambles.** Acts 2006 (1st Ex. Sess.), No. 1, contained a preamble which read:

"WHEREAS, the Eighty-Fifth General Assembly finds that when military service personnel have been killed in action or have died as a result of their service to our country, their families should be afforded some protections to ensure that they are able to grieve their loss in privacy and peace; and

"WHEREAS, the Eighty-Fifth General Assembly finds that families of military service personnel and other families who have lost a loved one have a substantial interest in organizing and attending funerals, memorial services, wakes, visitations, and burials for deceased relatives with a deference to their privacy and peace; and

"WHEREAS, funerals, memorial services, wakes, visitations, and burials are intensely emotional times for the families of those who have died; and

"WHEREAS, the interests of families who are mourning the loss of deceased relatives are violated when military and other funerals, memorial services, wakes, visitations, or burials are targeted for picketing and other public demonstrations; and

"WHEREAS, the State of Arkansas has historically given deference to honoring those who have died and their grieving families and loved ones; and

"WHEREAS, the Eighty-Fifth General Assembly finds that it is imperative that grieving families, friends, and loved ones are given an adequate opportunity to mourn immediately before, during, and immediately after funerals, memorial services, wakes, visitations, and burials free from protesting and picketing; and

"WHEREAS, such a limited restriction strikes a balance between the exercise of freedom of speech and other constitu-

tional rights while still affording families the right to mourn in peace,

"NOW THEREFORE, ..."

**Effective Dates.** Acts 1975 (Extended Sess., 1976), No. 1155, § 4: Feb. 11, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that a question has arisen as to whether Section 2913 of 280 of 1975, defining the offense of Public Intoxication, repealed by implication that portion of Ark. Stat. Ann. Section 48-943 (Repl. 1964) prohibiting the drinking of intoxicating beverages in public places; that the General Assembly did not intend to repeal by implication such portion of Section 48-943; that conflicting interpretations of the repealed effect of Section 2913 of Act 280 of 1975 will result in inequitable enforcement of the present statutory prohibition against public drinking; and that the immediate passage of this Act is necessary to clarify the state of the law as to the legality of drinking intoxicating beverages in public places. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 877, § 4: Apr. 13, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that a question has arisen over the validity of Act 1155 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law as to the legality of drinking intoxicating beverages in public places. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, Nos. 379 and 388, § 10: Mar. 8, 1993. Emergency clause provided: "It is hereby found and determined by the Gen-

eral Assembly that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate stalking and that immediate passage of this act is necessary to protect the public peace, health and safety of the State of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 1302, § 8: Apr. 14, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate stalking and that immediate passage of this act is necessary to protect the public peace, health and safety of the State of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 2003, No. 1342, § 6: Apr. 14, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the State of Arkansas' criminal statutes do not adequately address terrorism, as terrorism is known since September 11, 2001. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; or (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2006 (1st Ex. Sess.), No. 1, § 2: Apr. 7, 2006. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that when military service personnel have been killed in action or have died as a result to their service to our country, their families should be afforded some protection to ensure that they are able to grieve their loss in privacy and peace; that families of military personnel and other families who have lost a loved one have a substantial interest in organizing and attending funerals, memorial services, wakes, visitations, and burials for deceased relatives with a deference to their privacy and peace; and that this act is immediately necessary because it is imperative that grieving families of military personnel and other families who have lost a loved one are given an adequate opportunity to mourn immediately before, during, and immediately after funerals, memorial services, wakes, visitations, and burials free from protesting and picketing and that such a limited restriction strikes a balance between the exercise of freedom of speech and other constitutional rights while still affording families the right to mourn in peace. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

## RESEARCH REFERENCES

**ALR.** Insulting words addressed directly to police officer as disorderly con-

duct or breach of peace. 14 A.L.R.4th 1252.



**5-71-201. Riot.**

(a) A person commits the offense of riot if, with two (2) or more other persons, he or she knowingly engages in tumultuous or violent conduct that creates a substantial risk of:

- (1) Causing public alarm;
  - (2) Disrupting the performance of a governmental function; or
  - (3) Damaging or injuring property or a person.
- (b) Riot is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2902;  
A.S.A. 1947, § 41-2902.

**5-71-202. Aggravated riot.**

(a) A person commits the offense of aggravated riot if he or she commits the offense of riot when:

- (1) The person knowingly possesses a deadly weapon; or
  - (2) The person knows that another person with whom he or she is acting possesses a deadly weapon.
- (b) Aggravated riot is a Class D felony.

**History.** Acts 1975, No. 280, § 2903;  
A.S.A. 1947, § 41-2903; Acts 2007, No.  
827, § 92.

**5-71-203. Inciting riot.**

(a) A person commits the offense of inciting riot if he or she knowingly:

- (1) By speech or conduct urges others to participate in a riot under circumstances that produce a clear and present danger that they will participate in a riot; or
- (2) Gives commands, instructions, or signals to others in furtherance of a riot.

(b)(1) Inciting riot is a Class D felony if injury to a person or damage to property results from the offense.

- (2) Otherwise, inciting riot is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2904;  
A.S.A. 1947, § 41-2904.

**CASE NOTES****Equal Protection.**

Former section, which excluded lawful labor union activities from the prohibition on inciting to riot, did not deny equal

protection of the laws. *Chapman v. State*, 257 Ark. 415, 516 S.W.2d 598 (1974) (decision under prior law).

**5-71-204. Arming rioters.**

- (a) A person commits the offense of arming rioters if he or she:
- (1) Furnishes a deadly weapon or explosive device to another person knowing the deadly weapon or explosive device is to be used in a riot; or
  - (2) Instructs another person in the preparation or use of a deadly weapon or explosive device knowing that the deadly weapon or explosive device is to be used in a riot.
- (b) Arming rioters is a Class B felony.

**History.** Acts 1975, No. 280, § 2905;  
A.S.A. 1947, § 41-2905.

**5-71-205. Unlawful assembly.**

- (a) A person commits the offense of unlawful assembly if he or she:
- (1) Assembles with two (2) or more other persons; and
  - (2) Has the purpose of engaging in conduct constituting a riot.
- (b) Unlawful assembly is a Class C misdemeanor.

**History.** Acts 1975, No. 280, § 2906;  
A.S.A. 1947, § 41-2906.

**CASE NOTES****ANALYSIS**

Indictment or Information.  
Participation by Others Required.

**Indictment or Information.**

An indictment for rioting which would be good at common law was also good under former section prohibiting unlawful assembly. *Roberts v. State*, 21 Ark. 183 (1860) (decision under prior law).

Though good pleading required that names of other rioters be alleged, or allegation that their names were unknown,

information charging only one person was sufficient to sustain conviction where participation of at least two other persons was shown by the evidence. *Craig v. State*, 195 Ark. 925, 114 S.W.2d 1073 (1938) (decision under prior law).

**Participation by Others Required.**

To sustain a conviction, the participation of at least two other persons in a common unlawful purpose had to be shown. *Craig v. State*, 195 Ark. 925, 114 S.W.2d 1073 (1938) (decision under prior law).

**5-71-206. Failure to disperse.**

(a) A person commits the offense of failure to disperse if, during a riot or an unlawful assembly, he or she refuses or knowingly fails to disperse when ordered to disperse by a law enforcement officer or other person engaged in enforcing or executing the law.

(b) It is a defense to a prosecution under this section that the actor was a news reporter or other person observing or recording the events on behalf of the news media not knowingly obstructing efforts by a law enforcement officer or other person engaged in enforcing or executing the law to control or abate the riot or unlawful assembly.

(c) Failure to disperse is a Class C misdemeanor.

**History.** Acts 1975, No. 280, § 2907; A.S.A. 1947, § 41-2907.

### CASE NOTES

#### ANALYSIS

Law Enforcement Officer, Etc.  
Unlawful Assembly.

#### **Law Enforcement Officer, Etc.**

Words “other public officers” as used in former section providing penalty for failing to disperse meant other officers of the state or political subdivision thereof, such as city police, state police or deputy sheriffs. *Duncan v. Kirby*, 228 Ark. 917, 311

S.W.2d 157 (1958) (decision under prior law).

#### **Unlawful Assembly.**

Before an accused could be guilty of failing to disperse he had to assemble with another or others for the purpose of disturbing the peace or committing some unlawful act. *Duncan v. Kirby*, 228 Ark. 917, 311 S.W.2d 157 (1958) (decision under prior law).

### **5-71-207. Disorderly conduct.**

(a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she:

(1) Engages in fighting or in violent, threatening, or tumultuous behavior;

(2) Makes unreasonable or excessive noise;

(3) In a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response;

(4) Disrupts or disturbs any lawful assembly or meeting of persons;

(5) Obstructs vehicular or pedestrian traffic;

(6) Congregates with two (2) or more other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement officer or other person engaged in enforcing or executing the law;

(7) Creates a hazardous or physically offensive condition;

(8) In a public place, mars, defiles, desecrates, or otherwise damages a patriotic or religious symbol that is an object of respect by the public or a substantial segment of the public; or

(9) In a public place, exposes his or her private parts.

(b) Disorderly conduct is a Class C misdemeanor.

**History.** Acts 1975, No. 280, § 2908; A.S.A. 1947, § 41-2908; Acts 2007, No. 827, § 93.

**Cross References.** Dueling, Ark. Const., Art. 19, § 2.

### RESEARCH REFERENCES

**ALR.** Validity, Construction, and Application of State Statutes and Municipal Ordinances Proscribing Failure or Refusal to Obey Police Officer's Order to Move On,

or Disperse, on Street, as Disorderly Conduct. 52 A.L.R.6th 125.

**Ark. L. Rev.** Egan, “Fighting Words” Doctrine: Are Police Officers Held to a



Higher Standard, or per *Bailey v. State*, Do We Expect No More from our Law Enforcement Officers than We Do from the Average Arkansan, 52 Ark. L. Rev. 591.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Criminal Law, 1 U. Ark. Little Rock L.J. 153.

## CASE NOTES

### ANALYSIS

Constitutionality.

Abusive or Obscene Language.

Arrest.

Disruption or Disturbance of Assembly.

Evidence.

Indictment.

Intent.

Place of Offense.

Search.

Separate Offenses.

Unreasonable or Excessive Noise.

### Constitutionality.

Former section concerning use of abusive language as breach of the peace was narrowed to "fighting words" addressed to or about a person in his presence which were calculated to arouse anger in such person, and such words were not protected by the constitutional guarantee of free speech. *Hammond v. State*, 255 Ark. 56, 498 S.W.2d 652 (1973) (decision under prior law).

This section is not unconstitutionally overbroad. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

### Abusive or Obscene Language.

Whether profane language was calculated to arouse to anger or produce a breach of the peace was a question left to the jury. *State v. Moser*, 33 Ark. 140 (1878); *Ruffin v. State*, 207 Ark. 672, 182 S.W.2d 673 (1944) (preceding decisions under prior law).

It was not necessary for conviction for use of profanity that the profane language be used publicly. *Bodenhamer v. State*, 60 Ark. 10, 28 S.W. 507 (1894) (decision under prior law).

Indictment charging that defendant "did profanely swear and curse" was sufficient without setting out the profane words. *Bodenhamer v. State*, 60 Ark. 10, 28 S.W. 507 (1894) (decision under prior law).

Words used by defendant held insufficient to support conviction. *Holmes v. State*, 135 Ark. 187, 204 S.W. 846 (1918) (decision under prior law).

An indictment which followed the language of the former section concerning use of abusive language as a breach of peace was sufficient. *Schaal v. State*, 150 Ark. 631, 235 S.W. 38 (1921) (decision under prior law).

The fact that abusive language addressed to the arresting officer did not make the officer angry did not prevent it from constituting a violation. *Meyers v. State*, 253 Ark. 38, 484 S.W.2d 334 (1972) (decision under prior law).

Use of certain words was considered the use of "fighting words" under the circumstances, and thus fell within the constitutional reading of former section concerning use of abusive language as a breach of the peace. *Hammond v. State*, 255 Ark. 56, 498 S.W.2d 652 (1973) (decision under prior law).

Conviction for use of profane, violent or abusive language was improper where there was no determination by the trier of fact that the words spoken by defendant were likely to arouse to immediate and violent anger the person to whom the words were addressed. *Hammond v. Addison*, 536 F.2d 237 (8th Cir. 1976) (decision under prior law).

Curses and epithets addressed to a police officer in a department store were "fighting words" within subdivision (a)(3) even though the person addressed was a police officer who was not aroused to violent anger. *Bousquet v. State*, 261 Ark. 263, 548 S.W.2d 125 (1977).

### Arrest.

Where the conduct of the defendant gave reasonable cause to believe that he was in violation of this section, his subsequent warrantless arrest was legal under Ark. R. Crim. P. 4.1(c)(iii). *Williams v. State*, 47 Ark. App. 143, 887 S.W.2d 312 (1994).

### Disruption or Disturbance of Assembly.

It was not necessary to charge the manner of disturbance in any language more explicit than that used in the former sec-

tion providing penalty for disturbing an assemblage. *State v. Minyard*, 12 Ark. (7 English) 156 (1851) (decision under prior law).

Indictment for disturbing a religious congregation which did not allege the manner of disturbance was bad in substance and did not support a judgment on a plea of guilty. *Fletcher v. State*, 12 Ark. (7 English) 169 (1851) (decision under prior law).

An indictment for disturbing a congregation assembled for religious worship by "profanely swearing" and by "talking and laughing aloud" was not bad for duplicity, the latter words being merely surplusage. *State v. Horn*, 19 Ark. (6 Barber) 578 (1858) (decision under prior law).

The disturbance of any member of a congregation assembled for religious worship was, in law, a disturbance of the congregation. *State v. Wright*, 41 Ark. 410 (1883); *Walker v. State*, 103 Ark. 336, 146 S.W. 862 (1912) (preceding decisions under prior law).

Membership in a church or organization is not necessarily the controlling factor as to whether a person has committed a crime at a meeting; thus, either a member or a stranger can be guilty of unlawfully disrupting a lawful assembly. *State v. Kimbrough*, 265 Ark. 289, 578 S.W.2d 26 (1979).

### **Evidence.**

Evidence was sufficient to support a conviction for disorderly conduct for cursing police officers in a public place, where defendant was standing in the street shouting, flailing his arms around, cursing, and yelling, and stripping off his shirt and making a fist while taking an aggressive stance against one officer. *Johnson v. State*, 70 Ark. App. 343, 19 S.W.3d 66 (2000).

Evidence was sufficient to support a conviction for disorderly conduct where (1) the defendant cursed a police officer after being asked his name, (2) the defendant then alternated between states of calm and irrationality and, during those periods of irrationality, he flailed his arms about, cursed loudly, and eventually demonstrated a violent demeanor towards an officer, and (3) another officer on the scene knew the defendant and was aware of his past charge of assaulting a police officer. *Johnson v. State*, 343 Ark. 343, 37 S.W.3d 191 (2001).

Evidence supported the inference that defendant juvenile intended to engage in the conduct of hitting a nurse and threatening her and a doctor's lives to create public inconvenience, annoyance, or alarm in violation of this section because the nurse testified that defendant attacked her on several different occasions, and defendant did not argue that he was in any way incapable of controlling his actions at the time he threatened to kill either the nurse or the doctor and struck the nurse; at the very least, defendant consciously disregarded the effects of his actions. *M.T. v. State*, 2009 Ark. App. 761, 350 S.W.3d 792 (2009).

There was sufficient evidence to uphold defendant's conviction for disorderly conduct in violation of this section because after police officers arrived at defendant's house in response to a request from a utility company for a civil standby for a tree service to trim the trees along electric lines, defendant became and remained irrational, even after being told that she could be arrested, she cursed police officers and tree service employees, and she aggressively ran from person to person confronting them, both inside and outside the designated work zone; there was testimony from the operations manager of the tree service that he was intimidated by defendant and was concerned for the well-being of his employees, one of the officers also testified that she was intimidated by defendant, and the trial court, as the finder of fact, found the testimony of the state's witnesses to be more credible than the testimony of defendant and her husband. *Watkins v. State*, 2010 Ark. App. 85, 377 S.W.3d 286, cert. denied, 562 U.S. 892, 131 S. Ct. 275, 178 L. Ed. 2d 140 (2010).

### **Indictment.**

In an indictment for disturbing a religious congregation by profanely swearing, it was not necessary to charge the particular language used by the defendant. *State v. Ratliff*, 10 Ark. (5 English) 530 (1850) (decision under prior law).

An indictment for disturbing religious worship "by talking and laughing" and by indecent gestures was not bad for duplicity. It charged but one offense; the words "by talking and laughing" were merely surplusage. *State v. Bledsoe*, 47 Ark. 233, 1 S.W. 149 (1886) (decision under prior law).



An indictment for disturbing a religious congregation was insufficient if it failed to allege that the language or conduct charged as a disturbance was calculated to disquiet, insult, or interrupt the congregation. *State v. Booe*, 62 Ark. 512, 37 S.W. 47 (1896) (decision under prior law).

#### **Intent.**

An intent to disturb was not necessary. *Walker v. State*, 103 Ark. 336, 146 S.W. 862 (1912) (decision under prior law).

#### **Place of Offense.**

There is no requirement in this section that the disorderly conduct must take place on public property since, unquestionably, public inconvenience, annoyance or alarm within the meaning of this section can occur due to an individual's conduct whether such conduct takes place on private or public property. *Farr v. State*, 6 Ark. App. 14, 636 S.W.2d 884 (1982).

#### **Search.**

Since the crime addressed by this section is a minor offense, no exigent circumstances were present that would have allowed police officer's warrantless entry into the defendant's home under the "hot pursuit" exception to the warrant requirement, for what was a petty disturbance. *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412, cert. denied, 506 U.S. 998, 113 S. Ct. 597, 121 L. Ed. 2d 534 (1992).

#### **Separate Offenses.**

The offense of a breach of the peace by using abusive language was not embraced in the act of assault and battery; they were not of the same generic class and one

could not be included in the other, although they arose out of the same occurrence or transaction. *Moreland v. State*, 125 Ark. 24, 188 S.W. 1 (1916) (decision under prior law).

Prosecution in the justice of the peace court for assault and disturbing the public peace did not constitute former jeopardy in prosecution for sodomy, as there was no relation between the misdemeanors of assault and disturbing the peace and the felony of sodomy. *Verser v. State*, 256 Ark. 609, 509 S.W.2d 299 (1974) (decision under prior law).

Disorderly conduct, assault, and battery are not lesser included offenses of robbery but are simply offenses of a different class. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

#### **Unreasonable or Excessive Noise.**

Where the information charged defendant with disturbing the peace by operating a go-kart race track and juke box in a loud and unusually noisy manner, it sufficiently charged the crime of disturbing the peace, although it also stated that defendant thereby disturbed the peace of a named individual. *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962) (decision under prior law).

**Cited:** *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982); *Perkins v. Cross*, 562 F. Supp. 85 (E.D. Ark. 1983); *McIntosh v. White*, 582 F. Supp. 1244 (E.D. Ark. 1984); *McIntosh v. White*, 676 F. Supp. 912 (E.D. Ark. 1987); *Williams v. State*, 327 Ark. 97, 938 S.W.2d 547 (1997); *Giron v. City of Alexander*, 693 F. Supp. 2d 904 (E.D. Ark. 2010).

### **5-71-208. Harassment.**

(a) A person commits the offense of harassment if, with purpose to harass, annoy, or alarm another person, without good cause, he or she:

(1) Strikes, shoves, kicks, or otherwise touches a person, subjects that person to offensive physical contact or attempts or threatens to do so;

(2) In a public place, directs obscene language or makes an obscene gesture to or at another person in a manner likely to provoke a violent or disorderly response;

(3) Follows a person in or about a public place;

(4) In a public place repeatedly insults, taunts, or challenges another person in a manner likely to provoke a violent or disorderly response;



(5) Engages in conduct or repeatedly commits an act that alarms or seriously annoys another person and that serves no legitimate purpose; or

(6) Places a person under surveillance by remaining present outside that person's school, place of employment, vehicle, other place occupied by that person, or residence, other than the residence of the defendant, for no purpose other than to harass, alarm, or annoy.

(b) Harassment is a Class A misdemeanor.

(c) It is an affirmative defense to prosecution under this section if the actor is a law enforcement officer, licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his or her duty while conducting surveillance on an official work assignment.

(d)(1) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(2) This no contact order remains in effect during the pendency of any appeal of a conviction under this section.

(3) The judicial officer or prosecuting attorney shall provide a copy of this no contact order to the victim and arresting agency without unnecessary delay.

(e) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

**History.** Acts 1975, No. 280, § 2909; 388, § 5; 1995, No. 1302, § 3.  
1985, No. 711, § 1; A.S.A. 1947, § 41-2909; Acts 1993, No. 379, § 5; 1993, No.

**Cross References.** Terroristic threatening, § 5-13-301.

RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Notes, Constitutional Law — The Domestic Abuse Act of 1989 — An Impermissible Expan-

sion of Chancery Jurisdiction. *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 U. Ark. Little Rock L.J. 537.

CASE NOTES

ANALYSIS

In General.  
Civil Remedies.  
Evidence.  
Obscene Language.  
Separate Offenses.

**In General.**

Language in this section did not require the State to prove that a defendant's activities served no good purpose, but required the State to prove that, with pur-

pose to harass, annoy, or alarm another person, without good cause, the defendant followed that person in or about a public place or engaged in conduct or repeatedly committed an act that alarmed or seriously annoyed another person and that served no legitimate purpose. *Fennell v. State*, 2016 Ark. App. 142 (2016).

**Civil Remedies.**

A plaintiff who alleged that her neighbors harassed her had a criminal remedy under this section and thus was not en-

titled to injunctive relief against her neighbors. *Maxwell v. Sutton*, 2 Ark. App. 359, 621 S.W.2d 239 (1981).

#### **Evidence.**

Where a juvenile directed comments at another student on the school bus without making any gestures, the evidence did not support his delinquency adjudication for harassment as the comment was not made in a manner likely to provoke a violent or disorderly response. *Hunt v. State*, 92 Ark. App. 342, 213 S.W.3d 667 (2005).

Evidence was sufficient to support a conviction for first-degree stalking because there was a course of conduct of harassment based on the threats made to the victim. Weeks before the incident at issue, defendant forced the victim to have oral sex with him by threatening to tell her probation officers about prescriptions, and he threatened her that she would never see her son again. *Van Winkle v. State*, 2014 Ark. App. 591, 445 S.W.3d 542 (2014).

Evidence was sufficient to sustain defendant's harassment conviction under this section where the victims' testimony described their interactions with defen-

dant, and the jury, based on that testimony, clearly thought that defendant did not have good cause or a legitimate purpose for his actions. *Fennell v. State*, 2016 Ark. App. 142 (2016).

#### **Obscene Language.**

Conviction for use of profane, violent or abusive language was improper where there was no determination by the trier of fact that the words spoken by the defendant were likely to arouse to immediate and violent anger the person to whom the words were addressed. *Hammond v. Adkisson*, 536 F.2d 237 (8th Cir. 1976) (decision under prior law).

#### **Separate Offenses.**

Uttering vulgar or profane language at the domicile of another and making violent threats against him there with an intent to insult or terrify him were distinct offenses and could not be joined in the same indictment. *State v. Lancaster*, 36 Ark. 55 (1880) (decision under prior law).

**Cited:** *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990); *Kirkendoll v. State*, 57 Ark. App. 321, 945 S.W.2d 400 (1997); *Lemmond v. State*, 2012 Ark. App. 390 (2012).

### **5-71-209. Harassing communications.**

(a) A person commits the offense of harassing communications if, with the purpose to harass, annoy, or alarm another person, the person:

(1) Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of written communication, in a manner likely to harass, annoy, or cause alarm;

(2) Makes a telephone call or causes a telephone to ring repeatedly, with no purpose of legitimate communication, regardless of whether a conversation ensues; or

(3) Knowingly permits any telephone under his or her control to be used for any purpose prohibited by this section.

(b) An offense involving use of a telephone may be prosecuted in the county where the defendant was located when he or she used a telephone, or in the county where the telephone made to ring by the defendant was located.

(c) Harassing communications is a Class A misdemeanor.

(d)(1) Upon the pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to

the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(2) This no contact order remains in effect during the pendency of any appeal of a conviction under this section.

(3) The judicial officer or prosecuting attorney shall provide a copy of this no contact order to the victim and arresting agency without unnecessary delay.

(e) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

**History.** Acts 1975, No. 280, § 2910; 379, § 6; 1993, No. 388, § 6; 1995, No. A.S.A. 1947, § 41-2910; Acts 1993, No. 1302, § 4.

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Notes, Constitutional Law — The Domestic Abuse Act of 1989 — An Impermissible Expansion of Chancery Jurisdiction. *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 U. Ark. Little Rock L.J. 537.

### CASE NOTES

**Cited:** *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986); *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990).

### 5-71-210. Communicating a false alarm.

(a) A person commits the offense of communicating a false alarm if he or she purposely initiates or circulates a report of a present, past, or impending bombing, fire, offense, catastrophe, or other emergency while knowing that the report is false or baseless and knowing that it is likely to:

(1) Cause action of any sort by an official or volunteer agency organized to deal with emergencies;

(2) Place any person in fear of physical injury to himself or herself or another person or of damage to his or her property or that of another person; or

(3) Cause total or partial evacuation of any occupiable structure, vehicle, or vital public facility.

(b)(1)(A) Communicating a false alarm is a Class C felony if physical injury to a person results.

(B) Communicating a false alarm is a Class D felony if:

(i) Damage to property results; or

(ii) The false alarm communicates a present or impending bombing and is made to or about a public or private educational institution.

(2)(A) If there is no resulting physical injury or damage to property, communicating a false alarm is a Class A misdemeanor.

(B) A second or subsequent offense that would otherwise be a Class A misdemeanor is a Class D felony.



(c) In addition to any other restitution ordered under § 5-4-205, the court may order that a person who violates this section make restitution to the State of Arkansas or any of its political subdivisions for any cleanup costs associated with the commission of the offense.

**History.** Acts 1975, No. 280, § 2911; A.S.A. 1947, § 41-2911; Acts 2001, No. 567, § 1; 2003, No. 1342, § 4.

**A.C.R.C. Notes.** Acts 2003, No. 1342, § 4, did not accurately engross the

amendments to this section. Certain language was inadvertently deleted during the amendment process and added back by the Arkansas Code Revision Commission pursuant to a review.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General As-

sembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

### 5-71-211. Threatening a fire or bombing.

(a) A person commits the offense of threatening a fire or bombing if he or she purposely threatens damage or injury to the person or property of another person by bombing, fire, or other means, in a manner likely to:

(1) Place another person in reasonable apprehension of:

(A) Physical injury to that person or another person; or

(B) Damage to that person's property or to the property of another person; or

(2) Create public alarm.

(b)(1) Threatening a fire or bombing is a Class D felony if physical injury to a person results.

(2) Otherwise, threatening a fire or bombing is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 2912; A.S.A. 1947, § 41-2912.

### 5-71-212. Public intoxication — Drinking in public.

(a) A person commits the offense of public intoxication if he or she appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that:

(1) The person is likely to endanger himself or herself or another person or property; or

(2) The person unreasonably annoys a person in his or her vicinity.

(b) Public intoxication is a Class C misdemeanor.

(c) A person commits the offense of drinking in public if the person, other than in a place of business licensed to sell alcoholic beverages for consumption on the premises, consumes any alcoholic beverage:

(1) In any public place;

(2) On any highway or street;

(3) Upon any passenger coach, streetcar, or in or upon any vehicle commonly used for the transportation of passengers; or

(4) In or about any depot, platform, waiting station or room, or other public place.

(d) Drinking in public is a Class C misdemeanor.

(e) The provisions of this section shall not be construed to prohibit or restrict the consumption of an alcoholic beverage when consumed as a part of a recognized religious ceremony or ritual.

**History.** Acts 1975, No. 280, § 2913; 1975 (Extended Sess. 1976), No. 1155, §§ 1, 2; A.S.A. 1947, §§ 41-2913, 41-2913.1; reen. Acts 1987, No. 877, § 1.

**A.C.R.C. Notes.** Part of this section was reenacted by Acts 1987, No. 877, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal

any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

**Cross References.** Beer festival permit, § 3-5-105.

Beer, malt beverage, and hard cider education, § 3-5-1409.

Wine tasting events, § 3-5-104.

## CASE NOTES

### ANALYSIS

Purpose.

Evidence.

Grounds for Arrest.

Intoxication.

Public Place.

Venue.

### Purpose.

While the primary purpose of former statute against public drunkenness was to prevent annoyance to other members of the general public, the statute also served as a protection to the offender. *Berry v. City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964) (decision under prior law).

### Evidence.

A conviction of appearing in drunken or intoxicated condition on a public highway was sustained by proof tending to show that the defendant was in an intoxicated condition on a certain road leading from a church which was being traveled by the public and also on a street in a certain town. *Simmons v. State*, 149 Ark. 348, 232 S.W. 597 (1921) (decision under prior law).

Evidence was sufficient to establish that defendant, charged with public drunkenness, was intoxicated. *Berry v. City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964) (decision under prior law).

Evidence sufficient to find that defendant was properly arrested for drinking in public. *Taylor v. State*, 254 Ark. 620, 495

S.W.2d 532 (1973) (decision under prior law).

Evidence held sufficient, notwithstanding the absence of any tests to confirm the defendant's intoxication, where the defendant admitted that he had 2 drinks on the night of his arrest and the arresting officer testified that the defendant was "extremely intoxicated." *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

### Grounds for Arrest.

Where the defendant fitted the description of a prowler, was found in the area in which the prowler was last seen, was unable to produce any identification and smelled strongly of alcohol, a police officer was justified in arresting him for intoxication. *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978).

### Intoxication.

Instruction that one does not have to be under the influence of whiskey to such an extent as to become boisterous or stagger or be down drunk; that whenever the whiskey causes a man to be out of the ordinary in his general demeanor, it is sufficient under what the law terms in this case as intoxicated held proper. *Simmons v. State*, 149 Ark. 348, 232 S.W. 597 (1921) (decision under prior law).

### Public Place.

One sitting in a motor vehicle near traveled portion of a highway was in a "public place." *Berry v. City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964) (decision under prior law).

Police officers who made an arrest for public intoxication in a private home were entitled to qualified immunity from the arrestee's subsequent civil rights action based on a charge of wrongful arrest, even though the arrestee was subsequently acquitted on the charge of public intoxication, where the officers had probable cause to make the arrest when the drunken arrestee refused the homeowner's request to leave her home, and where the Arkansas law concerning what constituted a "public place" in connection with a public intoxication offense was not well established at the time of the arrest so that the officers could not have known that their actions were improper. *Heslip v. Lobbs*, 554 F. Supp. 694 (E.D. Ark. 1982).

The definition of "public place" speaks only to accessibility, not visibility. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

Where defendant was attending a private party and was drinking on the tailgate of a pickup parked in the side yard of the residence, defendant was not drinking in a "public place" as that term is used in subsection (c) of this section. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

#### **Venue.**

It was proper to prove venue by evidence that the defendant while intoxicated was seen driving an automobile on the highway near the county line and that he was apparently going toward the county seat where he resided and where he occupied an official position. *McClain v. State*, 151 Ark. 266, 236 S.W. 263 (1922) (decision under prior law).

**Cited:** *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985); *Giron v. City of Alexander*, 693 F. Supp. 2d 904 (E.D. Ark. 2010).

### **5-71-213. Loitering.**

(a) A person commits the offense of loitering if he or she:

(1) Lingers, remains, or prowls in a public place or the premises of another without apparent reason and under circumstances that warrant alarm or concern for the safety of persons or property in the vicinity and, upon inquiry by a law enforcement officer, refuses to identify himself or herself and give a reasonably credible account of his or her presence and purpose;

(2) Lingers, remains, or prowls in or near a school building, not having any reason or relationship involving custody of or responsibility for a student and not having written permission from anyone authorized to grant permission;

(3) Lingers or remains in a public place or on the premises of another for the purpose of begging;

(4) Lingers or remains in a public place for the purpose of unlawful gambling;

(5) Lingers or remains in a public place for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual activity;

(6) Lingers or remains in a public place for the purpose of unlawfully buying, distributing, or using a controlled substance;

(7) Lingers or remains in a public place for the purpose of unlawfully buying, distributing, or consuming an alcoholic beverage;

(8) Lingers or remains on or about the premises of another for the purpose of spying upon or invading the privacy of another; or

(9) Lingers or remains on or about the premises of any off-site customer-bank communication terminal without any legitimate purpose.



(b) Among the circumstances that may be considered in determining whether a person is loitering are that the person:

- (1) Takes flight upon the appearance of a law enforcement officer;
- (2) Refuses to identify himself or herself; or
- (3) Manifestly endeavors to conceal himself or herself or any object.

(c) Unless flight by the actor or another circumstance makes it impracticable, prior to an arrest for an offense under subdivision (a)(1) of this section a law enforcement officer shall afford the actor an opportunity to dispel any alarm that would otherwise be warranted by requesting the actor to identify himself or herself and explain his or her presence and conduct.

(d) It is a defense to a prosecution under subdivision (a)(1) of this section if:

- (1) The law enforcement officer did not afford the defendant an opportunity to identify himself or herself and explain his or presence and conduct; or
- (2) It appears at trial that an explanation given by the defendant to the law enforcement officer was true and, if believed by the law enforcement officer at that time, would have dispelled the alarm.

(e) Loitering is a Class C misdemeanor.

**History.** Acts 1975, No. 280, § 2914; A.S.A. 1947, § 41-2914; Acts 1995, No. 557, § 1; 1995, No. 1107, § 1.

CASE NOTES

ANALYSIS

Construction With Other Law.  
Elements.

**Construction With Other Law.**

Defendant's motion to suppress evidence should have been granted because the stop and detention of defendant was impermissible under Ark. R. Crim. P. 3.1 where an officer only suspected defendant of the crime of loitering at the time he approached defendant; pursuant to subdivision (a)(6), the misdemeanor crime of loitering does not involve a danger of forcible injury to persons or of appropri-

ation of or damage to property. *Brazwell v. State*, 354 Ark. 281, 119 S.W.3d 499 (2003).

**Elements.**

Subdivision (a)(1) of this section requires that a person must both identify himself and give a reasonably credible account of his presence and purpose; failing to identify oneself is a separate element of the offense of loitering. *Johnson v. State*, 313 Ark. 308, 854 S.W.2d 336 (1993).

**Cited:** *Stufflebeam v. Harris*, 521 F.3d 884 (8th Cir. 2008).

**5-71-214. Obstructing a highway or other public passage.**

(a) A person commits the offense of obstructing a highway or other public passage if, having no legal privilege to do so and acting alone or with another person, he or she renders any highway or other public passage impassable to pedestrian or vehicular traffic.

(b) It is a defense to a prosecution under this section that:

(1) The highway or other public passage was rendered impassable solely because of a gathering of persons to hear the defendant speak or otherwise communicate;

(2) The defendant was a member of a gathering contemplated by subdivision (b)(1) of this section; or

(3) The highway or public passage obstructed has not been established as a city street, county road, or state or federal highway under the laws of this state and no civil court has established a right of passage by prescription for the highway or public passage.

(c) Obstructing a highway or other public passage is a Class C misdemeanor.

**History.** Acts 1975, No. 280, § 2915; A.S.A. 1947, § 41-2915; Acts 1999, No. 1105, § 1.

vate road, § 27-66-404.

Throwing injurious materials upon highways, § 27-51-1405.

**Cross References.** Obstruction of pri-

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — Criminal Law, 12 U. Ark. Little Rock L.J. 183.

## CASE NOTES

### ANALYSIS

In General.  
Highway or Public Passage.  
Legal Privilege.  
Obstructions.

#### In General.

Obstruction of a public road is illegal. Ark. Game & Fish Comm'n v. Lindsey, 292 Ark. 314, 730 S.W.2d 474 (1987).

#### Highway or Public Passage.

Former section penalizing the obstruction of public roads was applicable only to county roads and not to public streets in a municipal corporation. St. Louis, Iron Mountain & S. Ry. v. State, 85 Ark. 131, 107 S.W. 668 (1908) (decision under prior law).

Evidence that a road which passed over the accused's land had been used by the public for many years and that for more than seven years the accused had constructed gates obstructing the road, that there was no dedication of the road and that it was never recognized as being part of any road district, failed to establish that the road was a "public road" so as to warrant a conviction under former section penalizing the obstruction of any public

road. Simpson v. State, 210 Ark. 309, 195 S.W.2d 545 (1946) (decision under prior law).

#### Legal Privilege.

One who purchased lands over which a public road had been dedicated by the former owners by a bill of assurance on file in the recorder's office was held to have notice thereof and to be liable for its obstruction. Finney v. State, 172 Ark. 115, 287 S.W. 744 (1926) (decision under prior law).

#### Obstructions.

It was error to permit a landowner to maintain three gates across a roadway and require users to close two of such gates without requiring the landowner to construct cattle guards to permit the passages of automobiles or trucks without opening the gates. Hatchett v. Currier, 249 Ark. 829, 461 S.W.2d 934 (1971) (decision under prior law).

**Cited:** Britt v. State, 261 Ark. 488, 549 S.W.2d 84 (1977); Madewell v. State, 290 Ark. 580, 720 S.W.2d 913 (1986); Smith v. State, 296 Ark. 451, 757 S.W.2d 554 (1988); Hagen v. State, 318 Ark. 139, 883 S.W.2d 832 (1994).

**5-71-215. Defacing objects of public respect.**

(a) A person commits the offense of defacing objects of public respect if he or she purposely:

- (1) Defaces, mars, or otherwise damages any public monument;
- (2) Defaces, mars, or otherwise damages a work of art on display in any public place;
- (3) Defaces, mars, desecrates, or otherwise damages any place of worship, cemetery, or burial monument; or
- (4) Removes a broken or unbroken, commercial or rock, grave marker for any reason except for cleaning or repair by a family member, caretaker, or preservation organization.

(b)(1)(A) Except as provided in subdivision (b)(1)(B) of this section, defacing objects of public respect is a Class A misdemeanor if the value of repairing or replacing the damaged object does not exceed five hundred dollars (\$500).

(B) Defacing objects of public respect is a Class D felony if the value of repairing or replacing the damaged object does not exceed five hundred dollars (\$500) and if the object that is defaced, marred, desecrated, or otherwise damaged is a cemetery or burial monument.

(2)(A) Except as provided in subdivision (b)(2)(B) of this section, defacing objects of public respect is a Class D felony if the value of repairing or replacing the damaged object exceeds five hundred dollars (\$500), but does not exceed two thousand five hundred dollars (\$2,500).

(B) Defacing objects of public respect is a Class C felony if the value of repairing or replacing the damaged object exceeds five hundred dollars (\$500) but does not exceed two thousand five hundred dollars (\$2,500) and if the object that is defaced, marred, desecrated, or otherwise damaged is a cemetery or burial monument.

(3)(A) Except as provided in subdivision (b)(3)(B) of this section, defacing objects of public respect is a Class C felony if the value of repairing or replacing the damaged object exceeds two thousand five hundred dollars (\$2,500).

(B) Defacing objects of public respect is a Class B felony if the value of repairing or replacing the damaged object exceeds two thousand five hundred dollars (\$2,500) and if the object that is defaced, marred, desecrated, or otherwise damaged is a cemetery or burial monument.

**History.** Acts 1975, No. 280, § 2916; 169, § 1; 2005, No. 2232, § 4; 2007, No. A.S.A. 1947, § 41-2916; Acts 1993, No. 266, § 1.



CASE NOTES

ANALYSIS

Evidence.  
Intent.  
Mistake.  
Ownership and Use.

**Evidence.**

Evidence held insufficient to sustain a conviction. *Mitchell v. State*, 187 Ark. 1163, 58 S.W.2d 205 (1933); *Giles v. State*, 190 Ark. 218, 78 S.W.2d 70 (1935) (preceding decisions under prior law).

**Intent.**

An intent to injure someone was not an ingredient of this crime. *Saffell v. State*, 113 Ark. 97, 167 S.W. 483 (1914) (decision under prior law).

A malicious act within the meaning of former section concerning injury to graves or monuments was an unlawful and wrongful act intentionally, willfully and purposefully done without legal justifica-

tion or excuse, evidence of which could have been inferred from the acts committed or words spoken. *Cooper v. State*, 246 Ark. 368, 438 S.W.2d 681 (1969) (decision under prior law).

**Mistake.**

Persons acting in good faith in tearing down a schoolhouse were not guilty of the misdemeanor defined in former section penalizing anyone who willfully injured any church, lodge or other property used for public purposes. *Thompson v. State*, 151 Ark. 369, 236 S.W. 608 (1922) (decision under prior law).

**Ownership and Use.**

It was not necessary to name the owners of the property, and a person could have been held guilty of damaging church property although the building was also used as a schoolhouse. *Saffell v. State*, 113 Ark. 97, 167 S.W. 483 (1914) (decision under prior law).

**5-71-216. [Repealed.]**

**Publisher’s Notes.** This section, concerning defacing public buildings, was repealed by Acts 2013, No. 1348, § 17. The

section was derived from Acts 1975, No. 280, § 2917; A.S.A. 1947, § 41-2917.

**5-71-217. Cyberbullying.**

(a) As used in this section:

(1) “Communication” means the electronic communication of information of a person’s choosing between or among points specified by the person without change in the form or content of the information as sent and received;

(2) “Electronic means” means any textual, visual, written, or oral communication of any kind made through the use of a computer online service, Internet service, telephone, or any other means of electronic communication, including without limitation to a local bulletin board service, an Internet chat room, electronic mail, a social networking site, or an online messaging service; and

(3) “School employee” means a person who is employed full time or part time at a school that serves students in any of the grades kindergarten through grade twelve (K-12), including without limitation a:

- (A) Public school operated by a school district;
- (B) Public school operated by a state agency or institution of higher education;
- (C) Public charter school; or

(D) Private school.

(b) A person commits the offense of cyberbullying if:

(1) He or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, or harass another person; and

(2) The transmission was in furtherance of severe, repeated, or hostile behavior toward the other person.

(c) The offense of cyberbullying may be prosecuted in the county where the defendant was located when he or she transmitted, sent, or posted a communication by electronic means, in the county where the communication by electronic means was received by the person, or in the county where the person targeted by the electronic communications resides.

(d)(1) Cyberbullying is a Class B misdemeanor.

(2) Cyberbullying is a Class A misdemeanor if the victim is a school employee.

**History.** Acts 2011, No. 905, § 1; 2013, No. 1431, § 2; 2013, No. 1492, § 1; 2015, No. 1155, § 13.

**A.C.R.C. Notes.** Acts 2013, No. 1431, § 1, provided:

“The General Assembly finds that:

“(1) The successful recruitment and retention of school employees is essential to maintaining the state’s constitutional obligation to provide a free and efficient system of public education;

“(2) A safe and civil environment in any school is necessary for school employees to meet the objective of providing opportunities for students to learn and achieve high academic standards;

“(3) Cyberbullying of school employees has become a national problem, subjecting school employees to many forms of intentional harassment that can be emotionally and professionally devastating;

“(4) Because of the nature of online communications, students may feel they can act with anonymity and detachment when they are engaging in cyberbullying of a school employee;

“(5) Some examples of the means used by students are:

“(A) Building a fake profile or website;

“(B) Posting or encouraging others to post on the Internet private, personal, or sexual information pertaining to a school employee;

“(C) Posting an original or edited image of the school employee on the Internet;

“(D) Accessing, altering, or erasing any computer network, computer data, com-

puter program, or computer software, including breaking into a password-protected account or stealing or otherwise accessing passwords of a school employee;

“(E) Making repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a school employee;

“(F) Making, or causing to be made, and disseminating an unauthorized copy of data pertaining to a school employee in any form, including without limitation the printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network;

“(G) Signing up a school employee for a pornographic Internet site; or

“(H) Without authorization of the school employee, signing up a school employee for electronic mailing lists or to receive junk electronic messages and instant messages; and

“(6) This act is intended to heighten public attention to this crime and further protect an Arkansas public school employee from cyberbullying.”

**Amendments.** The 2013 amendment by No. 1431 added (d)(2).

The 2013 amendment by No. 1492, in (b)(1), substituted “electronic” for “electronic” and “or harass” for “harass, or alarm”.

The 2015 amendment added (a)(3); redesignated (d)(2)(A) as (d)(2); in (d)(2), deleted “of a school employee” following

“Cyberbullying” and added “if the victim is a school employee”; and deleted (d)(2)(B).

### **5-71-218 — 5-71-224. [Reserved.]**

### **5-71-225. [Repealed.]**

**Publisher’s Notes.** This section, concerning picketing or demonstrating before a private residence, was repealed by Acts 2005, No. 1994, § 523. The section was

derived from Acts 1969, No. 160, §§ 1-3; A.S.A. 1947, §§ 41-2966 — 41-2968; Acts 1989, No. 840, § 1.

### **5-71-226. Disruption of campus activities.**

(a)(1) It is unlawful for any group composed of two (2) or more persons to act jointly with one another or attempt any action in conjunction with one another at a public, private, or parochial school or college of this state, to:

(A) Obstruct or bar any hallway or door of any campus building or facility;

(B) Seize control of a campus building or facility;

(C) Prevent the meeting of or cause the disruption of any class; or

(D) Erect any type of barricade aimed at obstructing the orderly passage of a person or vehicle onto or off of a campus ground.

(2) However, nothing stated in this section applies to an activity of any labor organization or teachers’ organization.

(b) Any person convicted of violating any provision of this section is guilty of a Class A misdemeanor.

**History.** Acts 1969, No. 345, §§ 1, 2; A.S.A. 1947, §§ 41-2969, 41-2970; Acts 2005, No. 1994, § 352.

### **5-71-227. [Repealed.]**

**Publisher’s Notes.** This section, concerning the possession of a paging device by students, was repealed by Acts 2001,

No. 252, § 1. The section was derived from Acts 1989, No. 146, § 2.

### **5-71-228. Obstruction of shooting, hunting, fishing, or trapping activities.**

(a)(1) It is unlawful for any person to willfully obstruct or impede the participation of any individual in the lawful activity of shooting, hunting, fishing, or trapping in this state.

(2) Nothing in this section prohibits a landowner or lessee from exercising his or her lawful right to prohibit hunting, fishing, or trapping on his or her land, or from exercising any other legal right.

(b)(1) A court of general jurisdiction may enjoin conduct that would be in violation of subsection (a) of this section upon petition by a person affected or who reasonably may be affected by the conduct upon a



showing that the conduct is threatened or that it has occurred on a particular premises in the past and that it is not unreasonable to expect that under similar circumstances the conduct will be repeated.

(2)(A) A court of general jurisdiction may award damages, that may include an award for punitive damages, to any person adversely affected by a violation of subsection (a) of this section.

(B) In addition to any other item of special damages, the measure of damages may include expenditures of the affected person for license and permit fees, travel, guides, special equipment, and supplies, to the extent that the expenditures were rendered futile by prevention of taking of a wild animal or fish.

(c)(1)(A) Any person violating a provision of this section and in possession of a firearm is guilty of a Class A misdemeanor.

(B) Otherwise, a violation of this section is a Class B misdemeanor.

(2) If the person violating this section holds an Arkansas hunting, fishing, or trapping license at the time of conviction, the license is revoked.

(d) This section does not prevent any wildlife officer or other law enforcement officer from performing his or her duties.

**History.** Acts 1991, No. 149, §§ 1-4;  
2005, No. 1994, § 483.

## CASE NOTES

### Appeals.

Defendant, who harassed hunters and scared game by blowing a whistle and firing shots, was prevented from appealing his conviction of obstruction of shoot-

ing, hunting, fishing, or trapping activities because he failed to preserve for review his claims as to the constitutionality of this section. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003).

### 5-71-229. Stalking.

(a)(1) A person commits stalking in the first degree if he or she knowingly engages in a course of conduct that would place a reasonable person in the victim's position under emotional distress and in fear for his or her safety or a third person's safety, and the actor:

(A) Does so in contravention of an order of protection consistent with the Domestic Abuse Act of 1991, § 9-15-101 et seq., or a no contact order as set out in subdivision (a)(2)(A) of this section, protecting the same victim, or any other order issued by any court protecting the same victim;

(B) Has been convicted within the previous ten (10) years of:

(i) Stalking in the second degree;

(ii) Terroristic threatening, § 5-13-301, or terroristic act, § 5-13-310; or

(iii) Stalking or threats against another person's safety under the statutory provisions of any other state jurisdiction; or

(C) Is armed with a deadly weapon or represents by word or conduct that he or she is armed with a deadly weapon.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order remains in effect during the pendency of any appeal of a conviction under this subsection.

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order to the victim and the arresting law enforcement agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

(3) Stalking in the first degree is a Class C felony.

(b)(1) A person commits stalking in the second degree if he or she knowingly engages in a course of conduct that harasses another person and makes a terroristic threat with the purpose of placing that person in imminent fear of death or serious bodily injury or placing that person in imminent fear of the death or serious bodily injury of his or her immediate family.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order remains in effect during the pendency of any appeal of a conviction under this subsection.

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order to the victim and arresting law enforcement agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

(3) Stalking in the second degree is a Class D felony.

(c)(1) A person commits stalking in the third degree if he or she knowingly commits an act that would place a reasonable person in the victim's position under emotional distress and in fear for his or her safety or a third person's safety.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order remains in effect during the pendency of any appeal of a conviction under this subsection.

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order to the victim and arresting law enforcement agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter orders as are consistent with § 5-2-305.

(3) Stalking in the third degree is a Class A misdemeanor.

(d) It is an affirmative defense to prosecution under this section if the actor is a law enforcement officer, licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his or her duty while conducting surveillance on an official work assignment.

(e) It is not a defense to a prosecution under this section that the actor was not given actual notice by the victim that the actor's conduct was not wanted.

(f) As used in this section:

(1)(A) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, separated by at least thirty-six (36) hours, but occurring within one (1) year, including without limitation an act in which the actor directly, indirectly, or through a third party by any action, method, device, or means follows, monitors, observes, places under surveillance, threatens, or communicates to or about a person or interferes with a person's property.

(B)(i) "Course of conduct" does not include constitutionally protected activity.

(ii) If the defendant claims that he or she was engaged in a constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence;

(2)(A) "Emotional distress" means significant mental suffering or distress.

(B) "Emotional distress" does not require that the victim sought or received medical or other professional treatment or counseling; and

(3) "Harasses" means an act of harassment as prohibited by § 5-71-208.

**History.** Acts 1993, No. 379, §§ 1-3; 1993, No. 388, §§ 1-3; 1995, No. 1302, § 1; 2007, No. 827, § 94; 2013, No. 1014, § 1.

**A.C.R.C. Notes.** Acts 2013, No. 1014, § 1, amended subdivision (a)(3) of this section to read "Stalking in the first degree is a Class B C

felony." The apparent legislative intent was to make stalking in the first degree a Class C felony.

**Amendments.** The 2013 amendment

rewrote the introductory language in (a)(1); rewrote (a)(1)(b)(ii); substituted "Class C" for "Class B" in (a)(3); substituted "Class D" for "Class C" in (b)(3); added (c) and (e), redesignating subsections accordingly; in (f), added the language beginning "including without" to the end of (1)(A), inserted (2), and, in current (3), deleted the definition for "Immediate family" and added the definition for "Harasses".



## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Criminal Law, 16 U. Ark. Little Rock L.J. 91.

## CASE NOTES

## ANALYSIS

Course of Conduct.  
Evidence.  
Harasses.  
Terroristic Threat.

**Course of Conduct.**

"Course of conduct" as used in this section means a pattern of conduct composed of two or more acts separated by at least 36 hours but occurring within one year. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

This section does not require that a person first be subjected to conduct warranting an order of protection or an order of no contact and then endure at least two more acts separated by at least 36 hours before charges of stalking in the first degree can be filed. *Moses v. State*, 72 Ark. App. 357, 39 S.W.3d 459 (2001).

Evidence was sufficient to support a conviction for first-degree stalking because there was a course of conduct of harassment based on the threats made to the victim. Weeks before the incident at issue, defendant forced the victim to have oral sex with him by threatening to tell her probation officers about prescriptions, and he threatened her that she would never see her son again. *Van Winkle v. State*, 2014 Ark. App. 591, 445 S.W.3d 542 (2014).

**Evidence.**

Where the trial judge, in hearing the defendant's several answering machine messages to the victim, reasonably found that the defendant intended to terrorize the victim with threats of harm, substantial evidence existed to support defendant's conviction for second degree stalking. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

Evidence established that the defendant threatened physical injury to the victim or her immediate family where the victim testified that the defendant called her repeatedly and persistently after she

tried to terminate her relationship with him, that he threatened to find her husband and kill him, and that he told her, "You can get me arrested but that'll be the last thing you do." *Dye v. State*, 70 Ark. App. 329, 17 S.W.3d 505 (2000).

Where a witness testified that defendant chased the victim in his car, and the victim testified that defendant followed her in his car on several occasions, blocked the victim's car in her drive, and threatened to kill the victim, the evidence of defendant's guilt on the stalking charge was overwhelming and the improper admission of the unavailable officer's testimony was harmless as to the offense of second-degree stalking. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Three threats defendant made against the victim and her family constituted sufficient evidence of a terroristic threat; thus, defendant's conviction for first-degree stalking was affirmed. *Lowry v. State*, 364 Ark. 6, 216 S.W.3d 101 (2005).

Evidence was sufficient to support a conviction for stalking and a violation of an order of protection because the content and timing of text messages connected them to defendant through circumstantial evidence; the messages contained a daughter's nickname, names of people of whom defendant was jealous, and references to reconciliation with defendant's former wife. Moreover, one message was sent immediately after defendant was served with an order of protection. *Brawner v. State*, 2013 Ark. App. 413, 428 S.W.3d 600 (2013).

**Harasses.**

The term "harasses" employed in subdivision (b)(1) means acts of harassment as defined in § 5-71-208. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

**Terroristic Threat.**

The use of the term "terroristic threat" when defining the crime of stalking does not require that it be shown that the accused has the immediate ability to carry

out the threats. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

**Cited:** *Kirkendoll v. State*, 57 Ark. App. 321, 945 S.W.2d 400 (1997).

### **5-71-230. Violation of the protection of peace for mourning at a funeral.**

(a) As used in this section:

(1)(A) "Funeral" means a ceremony or memorial service held in connection with the burial or cremation of a person who has died in which the family of the deceased has a personal stake in memorializing and honoring the deceased and the desire to be able to mourn in peace during the ceremony or memorial service.

(B) "Funeral" does not include a procession related to the funeral; and

(2) "Picket" means to engage in the activity of protesting or demonstrating to target a funeral without authorization from the family of the deceased.

(b) A person commits the offense of violation of the protection of peace for mourning at a funeral if the person:

(1) Knowingly pickets a funeral;

(2) Has a purpose to interfere with the funeral; and

(3) Pickets:

(A) Within three hundred feet (300') of any ingress or egress of the funeral; and

(B) Either:

(i) During the funeral;

(ii) Within thirty (30) minutes immediately before the scheduled commencement of the funeral; or

(iii) Within thirty (30) minutes immediately following the completion of the funeral.

(c)(1) Violation of the protection of the peace for mourning at a funeral is a Class C misdemeanor.

(2) A person commits a separate offense for each funeral that the person pickets in violation of this section.

**History.** Acts 2006 (1st Ex. Sess.), No. 1, § 1; 2011, No. 142, § 1; 2013, No. 1125, § 17.

**Amendments.** The 2011 amendment added "in which the family of the deceased ... ceremony or memorial service" at the end of (a)(1)(A); added "without authoriza-

tion from the family of the deceased" at the end of (a)(2); and substituted "three hundred feet (300') of any ingress or egress" for "one hundred fifty feet (150') in (b)(3)(A).

The 2013 amendment substituted "Has a purpose" for "Intends" in (b)(2).

### **RESEARCH REFERENCES**

**ALR.** Actions by or Against Individuals or Groups Protesting or Picketing at Funerals. 40 A.L.R.6th 375.

SUBCHAPTER 3 — PROMOTING CIVIL DISORDER

SECTION.

5-71-301. Definitions.

5-71-302. Promoting civil disorder in the first degree.

SECTION.

5-71-303. Unaffected lawful uses of weapons.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Criminal Law, 8 U. Ark. Little Rock L.J. 559.

5-71-301. Definitions.

As used in this subchapter:

(1) “Civil disorder” means any public disturbance involving an act of violence by an assemblage of three (3) or more persons that causes an immediate danger of or results in damage or injury to the property or person of any other individual;

(2) “Explosive or incendiary device” includes:

- (A) Dynamite and any other form of a high explosive;
- (B) Any explosive bomb, grenade, missile, or similar device;
- (C) An explosive material, meaning:
  - (i) An explosive;
  - (ii) A blasting agent; and
  - (iii) A detonator; and

(D) Any incendiary bomb or grenade, fire bomb, or similar device, and including any device that consists of or includes a breakable container containing a flammable liquid or compound and a wick composed of any material that when ignited is capable of igniting the flammable liquid or compound, and can be carried or thrown by one (1) individual acting alone; and

(3) “Firearm” means the same as defined in § 5-1-102.

**History.** Acts 1985, No. 903, § 1; A.S.A. 1947, § 41-2926; Acts 1995, No. 989, § 1.

5-71-302. Promoting civil disorder in the first degree.

(1) Any person who teaches or demonstrates to any other person the use, application, or construction of any firearm or explosive or incendiary device capable of causing injury or death to any person, knowing or intending that the firearm or explosive or incendiary device be used in furtherance of a civil disorder is guilty of the crime of promoting civil disorder in the first degree.

(2) Promoting civil disorder in the first degree is a Class C felony.



**History.** Acts 1985, No. 903, § 2; A.S.A. 1947, § 41-2927.

### 5-71-303. Unaffected lawful uses of weapons.

Nothing in this subchapter shall be construed to prohibit the training or teaching of the use of a weapon for:

- (1) A law enforcement purpose;
- (2) Hunting;
- (3) Recreation;
- (4) Competition; or
- (5) Any other lawful use or activity.

**History.** Acts 1985, No. 903, § 3; A.S.A. 1947, § 41-2928.

## CHAPTER 72 WATER AND WATERCOURSES

#### SECTION.

- 5-72-101. [Repealed.]
- 5-72-102. Removal of trees growing on navigable rivers or streams.
- 5-72-103. Cutting timber on swamp and overflowed lands.
- 5-72-104. Leaving timber in navigable stream, drainage ditch, or stream bed.
- 5-72-105. Obstruction of drains by timber or material — Floating logs or boom.

#### SECTION.

- 5-72-106. Obstructing natural drains.
- 5-72-107. Keeping dams sufficiently open.
- 5-72-108. Injuring or destroying bridges, dams, levees, or embankments.
- 5-72-109. Injuring levees.
- 5-72-110. Driving on levees — Destruction of barricades.
- 5-72-111. [Repealed.]

**Cross References.** Criminal mischief, §§ 5-38-203, 5-38-204.

**Preambles.** Acts 1971, No. 142, contained a preamble which read: “Whereas, the natural environment is rapidly deteriorating in many areas of the State; and “Whereas, this deterioration is especially severe in the alluvial areas adjacent to navigable rivers and streams; and

“Whereas, in certain areas of the State the only trees of any size that are still standing are those cypress trees and other water tolerant trees below the normal high water mark on navigable rivers and streams; and

“Whereas, the beds of navigable rivers

and streams and all land lying below the normal high water mark of such streams belong to the State of Arkansas;

“Now, therefore ...”

**Effective Dates.** Acts 1873, No. 118, § 6: effective on passage.

Acts 1875, No. 93, § 2: effective 90 days after passage.

Acts 1899, No. 76, § 2: effective 30 days after passage.

Acts 1905, No. 320, § 4: effective on passage.

Acts 1909, No. 296, § 3: effective on passage.

Acts 1927, No. 158, § 3: effective on passage.

RESEARCH REFERENCES

Ark. L. Rev. Lex Aquae Arkansas, 27  
Ark. L. Rev. 429.

Land Use — Wetlands Regulation, 27  
Ark. L. Rev. 527.

5-72-101. [Repealed.]

**Publisher's Notes.** This section, concerning poisoning a lake or stream, was repealed by Acts 2005, No. 1994, § 524. The section was derived from Acts 1861,

No. 115, § 1, p. 242; C. & M. Dig., § 2540; Pope's Dig., § 3187; A.S.A. 1947, § 41-4055.

5-72-102. Removal of trees growing on navigable rivers or streams.

(a)(1) It is unlawful to remove any tree growing below the ordinary high watermark, as defined in § 15-22-202, on any river or stream in this state that has been designated as a navigable river or stream by a legislative act.

(2) However, an authorized representative of the United States Government or of this state that is charged with the responsibility of maintaining navigation and flood control on navigable rivers and streams may remove a tree growing below the ordinary high watermark of a navigable river or stream as the authorized representative deems necessary to properly carry out the authorized representative's duties.

(b) Any person violating a provision of this section is guilty of a violation and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

**History.** Acts 1971, No. 142, §§ 1, 2; A.S.A. 1947, §§ 41-4068, 41-4069; Acts 2005, No. 1994, § 468.

**Cross References.** Removal of timber from beds or bars of navigable streams without permit, § 22-5-803.

5-72-103. Cutting timber on swamp and overflowed lands.

(a) Any person who cuts, destroys, or removes any timber standing on any of the swamp and overflowed lands granted by the United States Congress to this state is subject to indictment and upon conviction is guilty of a Class B misdemeanor.

(b) Additionally, restitution is set at the full value of the timber cut, destroyed, or carried away.

**History.** Acts 1853, § 35, p. 161; C. & M. Dig., § 2547; Pope's Dig., § 3194; A.S.A. 1947, § 10-301; Acts 2005, No.

1994, § 468.  
**Cross References.** Actions by state for trespass, § 16-106-105.

**5-72-104. Leaving timber in navigable stream, drainage ditch, or stream bed.**

(a) It is unlawful for any person, partnership, company, or corporation cutting any timber or tree in this state to leave any tree top, tree trunk, or tree limb in any navigable stream, drainage ditch, or stream bed of any improved drainage project.

(b)(1) Any person, partnership, company, or corporation violating a provision of this section is guilty of a Class B misdemeanor.

(2) Each violation of this section constitutes a separate offense.

**History.** Acts 1965, No. 91, §§ 1, 2; A.S.A. 1947, §§ 41-4066, 41-4067; Acts 2005, No. 1994, § 383.

**5-72-105. Obstruction of drains by timber or material — Floating logs or boom.**

(a)(1) It is unlawful for any person or corporation to cause any timber, tree, or material to be felled or thrown into any ditch, drain, stream, or canal, whether natural or artificial, that tends to obstruct the free flow of water in the ditch, drain, stream, or canal.

(2) However, this subsection does not prevent any person from floating a log or having a boom in any natural stream in this state if the floating of the log or use of the boom does not tend to overflow the land adjacent to the boom.

(b)(1) Any person, levee district, or drainage district interested in the maintenance of the free flow of water through any stream, drain, ditch, or canal, may remove any timber, tree, or material in the stream, ditch, drain, or canal that tends to obstruct the free flow of water.

(2) The person, levee district, or drainage district has a cause of action against any person or corporation that may have felled or thrown, or caused to be felled or thrown timber, a tree, or material into a stream, drain, ditch, or canal, for the reasonable cost of removing the timber, tree, or material.

(c) Any person or corporation that violates subsection (a) of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

**History.** Acts 1905, No. 320, §§ 1-3, p. 764; C. & M. Dig., §§ 3662-3664; Pope's Dig., §§ 4513-4515; A.S.A. 1947, §§ 21-406 — 21-408; Acts 2005, No. 1994, § 469;

2007, No. 827, § 95.

**Cross References.** Penalty for obstructing drains, § 14-121-105.



CASE NOTES

ANALYSIS

Cause of Action.  
Injunctions.

**Cause of Action.**

The right conferred by subsection (b) is a continuing one. *Beck v. State ex rel. Att'y Gen.*, 179 Ark. 102, 14 S.W.2d 1101 (1929).

**Injunctions.**

The pollution of a stream will be enjoined. *Meriwether Sand & Gravel Co. v. State ex rel. Att'y Gen.*, 181 Ark. 216, 26 S.W.2d 57 (1930).

One whose land was drained by a slough flowing thence across the land of another was entitled to a mandatory injunction to compel such other landowner to remove a levee which he built across the slough in such a way that it obstructed the drainage of plaintiff's land. *Solomon v. Congleton*, 245 Ark. 487, 432 S.W.2d 865 (1968).

**Cited:** *Lee-Phillips Drainage Dist. v. Beaver Bayou Drainage Dist.*, 226 Ark. 105, 289 S.W.2d 192 (1956).

**5-72-106. Obstructing natural drains.**

(a) It is unlawful for any person to obstruct in any manner any natural drain in this state.

(b) Any person that obstructs in violation of subsection (a) of this section any natural drain is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

(c) This section does not apply to the following counties:

- (1) Craighead County;
- (2) Lee County;
- (3) Phillips County; and
- (4) Woodruff County.

**History.** Acts 1909, No. 296, §§ 1, 2, p. 897; C. & M. Dig., § 2758; Pope's Dig., § 3440; Acts 1971, No. 43, § 1; A.S.A.

1947, §§ 41-4051, 41-4052; Acts 2005, No. 1994, § 469.

CASE NOTES

**Levee.**

Where the city's proposed levee would not block a natural watercourse, the increased water elevation on the plaintiffs' properties caused by the proposed levee would be de minimis, and where the city had sufficient funds to compensate the plaintiffs for any damage to their property

and to maintain the levee, construction of the levee was not enjoined. *Scroggin v. City of Grubbs*, 318 Ark. 648, 887 S.W.2d 283 (1994).

**Cited:** *St. Louis, Iron Mountain & S. Ry. v. Board of Dirs.*, 103 Ark. 127, 145 S.W. 892 (1912).

**5-72-107. Keeping dams sufficiently open.**

(a) Any person owning, operating, or controlling any dam or other obstruction across any river, creek, or other stream in this state shall at all times keep the dam or other obstruction open so as to permit a flow of water sufficient to maintain fish life in the stream below the dam or other obstruction.

(b) Any person violating a provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

**History.** Acts 1927, No. 158, §§ 1, 2; Pope's Dig., §§ 3667, 3668, 5975, 5976, 14491, 14492; A.S.A. 1947, §§ 41-4053, 41-4054; Acts 2005, No. 1994, § 469.

**Cross References.** Preventing passage of fish prohibited, § 15-44-110.

### **5-72-108. Injuring or destroying bridges, dams, levees, or embankments.**

Any person who willfully and maliciously cuts down, breaks, injures, or destroys any bridge, mill-dam or other dam, or levee erected or constructed to create hydraulic power or to prevent the overflow of lands or any embankment necessary to support the dam or levee or makes or causes to be made any aperture in the dam or embankment with intent to destroy or injure the dam or embankment is guilty of a violation and upon conviction shall be fined in any sum not exceeding five thousand dollars (\$5,000).

**History.** Rev. Stat., ch. 44, div. 4, art. 9, § 3180; A.S.A. 1947, § 41-4056; Acts § 4; C. & M. Dig., § 2530; Pope's Dig., 2005, No. 1994, § 57.

### **5-72-109. Injuring levees.**

(a) Should any person cut, break, or in any way damage any public levee constructed or to be constructed, by authority of this state, or paid for or to be paid for, out of any funds of this state, or out of the funds of any county or public corporation, in whole or in part, that person is guilty of a Class D felony.

(b)(1) Any person who enters upon the premises of another and willfully and maliciously cuts down, breaks, or destroys any levee erected or constructed to prevent the overflow of lands, or any embankment necessary to support the levee, with intent to destroy or injure the levee or embankment, is guilty of a felony.

(2) However, nothing in this section shall be construed to protect any levee or embankment obstructing or damming a running stream or natural outlet for the water so as to injure another person, unless the levee or embankment has been condemned to public use in the manner provided by the Arkansas Constitution and laws of the state.

**History.** Acts 1874 (Spec. Sess.), No. 27, §§ 41-4057 — 41-4059; Acts 2005, No. §§ 1-3, p. 37; C. & M. Dig., §§ 2747-2749; 1994, § 431. Pope's Dig., §§ 3430-3432; A.S.A. 1947,

### **5-72-110. Driving on levees — Destruction of barricades.**

(a) If any public levee or any private levee is constructed and maintained for the purpose of protection against overflow, any person

who drives any vehicle or rides on the levee without the consent of the owner, using the levee as a road bed, or who cuts, tears down, destroys, or injures a barricade, fence, or other construction erected or built for the protection of the levee, is guilty of a Class B misdemeanor.

(b) The provisions of this section do not apply to an instance in which:

(1) A road has been laid out by a lawful authority upon a levee that has ceased to be of any practical use to the county in the rear of the levee; or

(2) A lawful authority has established a crossing over the levee.

**History.** Acts 1873, No. 118, §§ 1-4, p. 282; 1875, No. 93, § 1, p. 210; 1893, No. 74, § 1, p. 118; 1899, No. 76, § 1, p. 130;

C. & M. Dig., § 2750; Pope’s Dig., § 3433; A.S.A. 1947, §§ 41-4060 — 41-4063; Acts 2005, No. 1994, § 470.

5-72-111. [Repealed.]

**Publisher’s Notes.** This section, concerning making cutoffs on the Mississippi River, was repealed by Acts 2005, No. 1994, § 546. The section was derived from

Acts 1857, §§ 1, 2, p. 166; C. & M. Dig., §§ 3665½, 3666; Pope’s Dig., §§ 4517, 4518; A.S.A. 1947, §§ 41-4064, 41-4065.

CHAPTER 73

WEAPONS

SUBCHAPTER.

1. POSSESSION AND USE GENERALLY.
2. UNIFORM MACHINE GUN ACT.
3. CONCEALED HANDGUNS.
4. CONCEALED HANDGUN LICENSE RECIPROCITY.

RESEARCH REFERENCES

**Am. Jur.** 79 Am. Jur. 2d, Weapons, § 8 et seq.  
**C.J.S.** 94 C.J.S., Weapons, § 24 et seq.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Criminal Law, 4 U. Ark. Little Rock L.J. 189.

SUBCHAPTER 1 — POSSESSION AND USE GENERALLY

SECTION.

- 5-73-101. Definitions.
- 5-73-102. Possessing instrument of crime.
- 5-73-103. Possession of firearms by certain persons.
- 5-73-104. Criminal use of prohibited weapons.

SECTION.

- 5-73-105. Legitimate manufacture, repair, and transportation of prohibited weapons.
- 5-73-106. Defacing a firearm.
- 5-73-107. Possession of a defaced firearm.
- 5-73-108. Criminal acts involving explosives.



## SECTION.

- 5-73-109. Furnishing a deadly weapon to a minor.
- 5-73-110. Disarming minors and mentally defective or mentally irresponsible persons — Disposition of property seized.
- 5-73-111. Unlawful procurement of a firearm.
- 5-73-112. Certification by a chief law enforcement officer regarding receipt or manufacture of a firearm.
- 5-73-113 — 5-73-118. [Reserved.]
- 5-73-119. Handguns — Possession by minor or possession on school property.
- 5-73-120. Carrying a weapon.
- 5-73-121. [Repealed.]
- 5-73-122. Carrying a firearm in publicly owned buildings or facilities.
- 5-73-123. [Repealed.]

## SECTION.

- 5-73-124. Tear gas — Pepper spray.
- 5-73-125. Interstate sale and purchase of shotguns, rifles, and ammunition.
- 5-73-126. Booby traps.
- 5-73-127. Possession of loaded center-fire weapons in certain areas.
- 5-73-128. Offenses upon property of public schools.
- 5-73-129. Furnishing a handgun or a prohibited weapon to a felon.
- 5-73-130. Seizure and forfeiture of firearm — Seizure and forfeiture of motor vehicle — Disposition of property seized.
- 5-73-131. Possession or use of weapons by incarcerated persons.
- 5-73-132. Sale, rental, or transfer of firearm to person prohibited from possessing firearms.
- 5-73-133. Possession of a taser stun gun.

**Cross References.** Confiscation and destruction of deadly weapons, § 16-90-119.

Disorderly conduct, § 5-71-207.

Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

**Preambles.** Acts 1969, No. 159, contained a preamble which read: "Whereas, the Secretary of the Treasury of the United States of America is charged with the administration of the Federal Gun Control Act of 1968; and

"Whereas, regulations issued pursuant to said Act provide with respect to the sale of ammunition to out-of-state residents and sales of shotguns and rifles; and

"Whereas, preliminary regulations indicated that the sale of ammunition to residents of bordering states would not be prohibited. However, the regulation promulgated recently would prohibit the sale of ammunition and shotguns and rifles to residents of adjacent states unless the state in which such ammunition or shotgun or rifle is sold indicates its assent to such sales; and

"Whereas, there are many sportsmen from the states of Missouri, Tennessee, Mississippi, Louisiana, Texas and Oklahoma who frequently visit the State of

Arkansas to hunt the game which abounds in this State; and

"Whereas, it would be a great inconvenience to those persons and an economic detriment to this State, if they were prohibited from purchasing ammunition and shotguns and rifles in the State of Arkansas; and

"Whereas, it is the intent of the General Assembly to authorize the sale of ammunition and shotguns and rifles to residents of adjacent states;

"Now, therefore ..."

**Effective Dates.** Acts 1949, No. 338, § 4: approved Mar. 21, 1949. Emergency clause provided: "It is hereby found and declared that the promiscuous possession, use and discharge of tear gas constitutes a serious hazard to the health and well-being of the people of this State; it is therefore declared that an emergency exists and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in force from and after its passage."

Acts 1969, No. 159, § 3: Mar. 4, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that under administrative regulations issued by

the Secretary of the Treasury of the United States, charged with administration and enforcement of the Federal Gun Control Act of 1968, affirmative State action must be taken to authorize the sale of ammunition, shotguns and rifles in the State to residents of adjacent states, and that, unless appropriate State action is taken, such sales are illegal. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, is declared to be in full force and effect from and after the date of its passage and approval."

Acts 1985, Nos. 243 and 399, § 3: Mar. 4, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that law enforcement officers are with increasing frequency locating booby traps designed to injure people and thereby deter the investigation of unlawful activities, especially those relating to illegal drugs; that there presently is no law prohibiting the installation of booby traps, and that this Act is immediately necessary to protect the public as well as law enforcement officers from injury caused by booby traps. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 74, § 3: Feb. 19, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that any person who has been convicted of a felony or adjudicated a mental defective or involuntarily committed to a mental institution may not possess or own any firearms; that this language is unfairly broad and that a mechanism should be devised whereby persons who constitute no danger to themselves or others should not be restricted for the duration of their lives from owning or possessing firearms; that this Act establishes a mechanism to allow the Governor or the Bureau of Alcohol, Tobacco and Firearms to determine which such persons should be relieved of such restriction; that the inequity of the present law will continue until this Act becomes effective. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of

the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989, No. 649, § 7: Mar. 17, 1989. Emergency clause provided: It is found and determined by the General Assembly that the possession of handguns by young Arkansans contributes substantially to the commission of crimes and injuries to innocent persons, and that the possession of such weapons by persons on school property has resulted in numerous recent injuries and deaths. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage.

Acts 1993, No. 264, § 7: Feb. 26, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that additional enforcement mechanisms are urgently needed to deter persons under nineteen (19) years of age from illegally using or possessing prohibited weapons upon the property of the public schools or in or upon any school bus; that this act provides an additional enforcement mechanism; and that this act should go into effect immediately in order to grant law enforcement officers and courts greater flexibility in dealing with the illegal use or possession of prohibited weapons in the public schools. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 781, § 7: Mar. 29, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that additional enforcement mechanisms are urgently needed to deter persons under nineteen (19) years of age from illegally using or possessing prohibited weapons upon the property of the public schools or in or upon any school bus; and this Act provides an additional enforcement mechanism; and that this Act should go into effect immediately in order to grant law enforcement officers and courts greater flexibility in dealing with the illegal use or possession of prohibited weapons in the public schools. Therefore, an emergency is hereby declared to exist, and



this act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 41 and 42, § 5: Aug. 25, 1994. Emergency clause provided: "It is hereby found and determined by the General Assembly that felons commit many serious criminal offenses by the use of handguns or by the use of prohibited weapons; that the criminal penalties for furnishing handguns and prohibited weapons to felons must be increased in order to decrease the availability of such weapons. Therefore in order to immediately enhance the penalties for furnishing handguns or prohibited weapons to a felon, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), No. 45, § 6: Aug. 25, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that minors commit many serious criminal offenses by the use of deadly weapons or by the use of prohibited weapons. The criminal penalties for furnishing deadly weapons to minors and for furnishing prohibited weapons, must be increased in order to decrease the availability of such weapons. Therefore, in order to immediately enhance the penalties for furnishing a deadly weapon to a minor and for furnishing a prohibited weapon, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 55 and 56, § 7: Aug. 26, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that a serious shortage of juvenile detention facilities exists and that there is an urgent need to provide for a longer permissible period during which a juvenile may be held in an adult jail; that in order to enable counties to detain larger

numbers of juveniles during the time necessary for such counties to construct additional juvenile detention facilities, the Governor needs authority to grant temporary waivers of certain restrictions on the manner of detaining juveniles; that possession of handguns and other unlawful weapons by juveniles is widespread and such possession contributes greatly to the incidence of violent crimes committed by juveniles; that serious measures are needed to remove handguns and other unlawful weapons from the hands of juveniles and to stop such possession; and that the authority of law enforcement officers to take juveniles into custody needs to be clarified. Therefore, in order to extend the time juveniles may be held in an adult jail; to invest the Governor with authority to grant temporary waivers of certain restrictions on the detention of juveniles; to immediately authorize the seizure, forfeiture, and destruction of unlawful weapons possessed by juveniles; to authorize the seizure and forfeiture of any vehicle in which a minor unlawfully possesses a weapon; to require detention of any juvenile who possesses a handgun or machine gun; and to clarify the authority of law enforcement officers to take juveniles into custody, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 57 and 58, § 6: Aug. 26, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that many juveniles who have previously been declared delinquent for having committed serious offenses possess handguns and that handgun possession by such juveniles poses a great risk of harm to them and to others. Therefore, in order to immediately increase the penalty for possession of a handgun by juveniles who have previously been found delinquent for having committed certain serious offenses, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."



Acts 1994 (2nd Ex. Sess.), No. 63, § 5: Aug. 26, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that many crimes are committed by felons who unlawfully possess firearms and that the penalty for unlawful possession of a firearm by a felon should be increased in order to discourage such unlawful possession. Therefore, in order to immediately increase the penalty for unlawful possession of a firearm by a felon, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 595, § 5: Mar. 13, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion has arisen with regard to the legality of possession of a firearm by persons who, upon pleading guilty or nolo contendere or being found guilty of a felony in circuit court, have been placed on probation, received a suspended sentence, had their conviction expunged, or are authorized to have their conviction expunged. Further, the opinion of the Arkansas Supreme Court in *Irvin v. State*, 301 Ark. 416, 784 S.W.2d 763 (1990), is at odds with the intent of the General Assembly with regard to the status of those whose felony convictions are subject to being expunged, even though they have not been actually expunged. It is the intent of this Act to legislatively overrule *Irvin v. State*, supra. Therefore, in order to immediately clarify the intent of the General Assembly with regard to the status of those persons who, upon pleading guilty or nolo contendere or being found guilty of felony in circuit court, have been placed on probation, received a suspended sentence, had their conviction expunged, or are authorized to have their conviction expunged, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2006 (1st Ex. Sess.), No. 14, § 2: Apr. 10, 2006. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that many companies in the state have contracts with the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice or the United States Department of Defense; that numerous employees of the companies have been or will be terminated from their positions because they cannot be granted relief from federal explosives disabilities under current Arkansas law; and that this act is immediately necessary in order to preserve jobs for the citizens of the State of Arkansas. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2013, No. 539, § 5: Mar. 28, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that a prosecuting attorney and his or her deputy prosecuting attorneys perform a vital public function and often are in dangerous situations due to the nature of the crimes they prosecute; and that this act is immediately necessary because allowing a prosecuting attorney and his or her deputy prosecuting attorneys to carry a firearm or concealed handgun is essential to the safe operation of criminal justice in this state. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

## RESEARCH REFERENCES

**ALR.** What constitutes “dangerous weapon” under statutes prohibiting the carrying of dangerous weapons in motor vehicles. 2 A.L.R.4th 1342.

“Bludgeon,” “blackjack,” or “billy” within meaning of criminal possession statute. 11 A.L.R.4th 1272.

Fact that weapon was acquired for self-defense or to prevent its use against defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons. 39 A.L.R.4th 967.

Sufficiency of evidence of possession in prosecution under statute prohibiting persons under indictment for or convicted of crime from acquiring, having, carrying or using firearms or weapons. 43 A.L.R.4th 788.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

**U. Ark. Little Rock L.J.** Oliver, Rejecting the “Whipping-Boy” Approach to Tort Law: Well-Made Handguns are not Defective Products, 14 U. Ark. Little Rock L.J. 1.

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**5-73-101. Definitions.**

As used in this chapter:

(1) “Blasting agent” means any material or mixture consisting of fuel and oxidizer intended for blasting if the finished product as mixed for use or shipment cannot be detonated by means of a No. 8 test blasting cap when unconfined;

(2) “Contraband” means any explosive material that was used with the knowledge and consent of the owner to facilitate a violation of this subchapter, as well as any explosive material possessed under circumstances prohibited by law;

(3) “Destructive device” means:

(A) Any of the following:

(i) Any explosive, incendiary, or poison gas;

(ii) Bomb;

(iii) Grenade;

(iv) Rocket having a propellant charge of more than four ounces (4 ozs.);

(v) Missile having an explosive or incendiary charge of more than one-quarter ounce (.25 oz.);

(vi) Mine; or

(vii) Similar device; and

(B) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (3)(A) of this section and from which a destructive device may be readily assembled for use as a weapon;

(4)(A) “Detonator” means any device containing any initiating or primary explosive that is used for initiating detonation.

(B) A detonator may not contain more than ten grams (10g) of total explosives by weight, excluding ignition or delay charges, and may include, without limitation, electric blasting caps of instantaneous and delay types, blasting caps for use with safety fuses, detonating

cord delay connectors, and noninstantaneous and delay blasting caps that use detonating cord, shock tube, or any other replacement for electric leg wires;

(5) “Distribute” means to sell, issue, give, transfer, or otherwise dispose of explosive material;

(6) “Explosive material” means an explosive, blasting agent, or detonator;

(7)(A) “Explosive” means any chemical compound mixture or device, the primary or common purpose of which is to function by explosion.

(B) “Explosive” includes, without limitation:

(i) Dynamite and any other high explosive;

(ii) Black powder;

(iii) Pellet powder;

(iv) An initiating explosive;

(v) A detonator;

(vi) A safety fuse;

(vii) A squib;

(viii) A detonating cord;

(ix) An igniter cord;

(x) An igniter;

(xi) Any material determined to be within the scope of 18 U.S.C.

§ 841 et seq.; and

(xii) Any material classified as an explosive other than consumer fireworks, 1.4 (Class C, Common), by the hazardous materials regulations of the United States Department of Transportation;

(8) “Instrument of crime” means anything manifestly designed, made, adapted, or commonly used for a criminal purpose;

(9) “Minor” means any person under eighteen (18) years of age; and

(10) “Violent felony conviction” means a conviction for any felony offense against the person which is codified in § 5-10-101 et seq., § 5-11-101 et seq., § 5-12-101 et seq., § 5-13-201 et seq., § 5-13-301 et seq., § 5-14-101 et seq., and § 5-14-201 et seq., or any other offense containing as an element of the offense one (1) of the following:

(A) The use of physical force;

(B) The use or threatened use of serious physical force;

(C) The infliction of physical harm; or

(D) The creation of a substantial risk of serious physical harm.

**History.** Acts 1975, No. 280, § 3101; A.S.A. 1947, § 41-3101; Acts 2001, No. 1430, § 1; 2005, No. 1226, § 1.

## RESEARCH REFERENCES

**Ark. L. Notes.** Leflar, *Lawyers, Guns and Money: Some Practical Advice about Taking Security Interests in Firearms*, 1998 Ark. L. Notes 55.

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.



Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

### **5-73-102. Possessing instrument of crime.**

(a) A person commits the offense of possessing an instrument of crime if he or she possesses any instrument of crime with a purpose to employ it criminally.

(b) Possessing an instrument of crime is a Class A misdemeanor.

**History.** Acts 1975, No. 280, § 3102; A.S.A. 1947, § 41-3102.

### **RESEARCH REFERENCES**

**ALR.** Construction and Application of United States Supreme Court Holdings in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) Respecting Second Amendment Right to Keep and Bear Arms, to State or Local Laws Regulating Firearms or Other Weapons. 64 A.L.R.6th 131.

### **5-73-103. Possession of firearms by certain persons.**

(a) Except as provided in subsection (d) of this section or unless authorized by and subject to such conditions as prescribed by the Governor, or his or her designee, or the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives, or other bureau or office designated by the United States Department of Justice, no person shall possess or own any firearm who has been:

- (1) Convicted of a felony;
- (2) Adjudicated mentally ill; or
- (3) Committed involuntarily to any mental institution.

(b)(1) Except as provided in subdivisions (b)(2) and (3) of this section, a determination by a jury or a court that a person committed a felony constitutes a conviction for purposes of subsection (a) of this section even though the court suspended imposition of sentence or placed the defendant on probation.

(2) Subdivision (b)(1) of this section does not apply to a person whose case was dismissed and expunged under § 16-93-301 et seq. or § 16-98-303(g).

(3) The determination by the jury or court that the person committed a felony does not constitute a conviction for purposes of subsection (a) of this section if the person is subsequently granted a pardon explicitly restoring the ability to possess a firearm.

(c)(1) A person who violates this section commits a Class B felony if:

- (A) The person has a prior violent felony conviction;
- (B) The person's current possession of a firearm involves the commission of another crime; or
- (C) The person has been previously convicted under this section or a similar provision from another jurisdiction.

(2) A person who violates this section commits a Class D felony if he or she has been previously convicted of a felony and his or her present conduct or the prior felony conviction does not fall within subdivision (c)(1) of this section.

(3) Otherwise, the person commits a Class A misdemeanor.

(d) The Governor may restore without granting a pardon the right of a convicted felon or an adjudicated delinquent to own and possess a firearm upon the recommendation of the chief law enforcement officer in the jurisdiction in which the person resides, so long as the underlying felony or delinquency adjudication:

(1) Did not involve the use of a weapon; and

(2) Occurred more than eight (8) years ago.

**History.** Acts 1975, No. 280, § 3103; 1977, No. 360, § 18; A.S.A. 1947, § 41-3103; Acts 1987, No. 74, § 1; 1994 (2nd Ex. Sess.), No. 63, § 1; 1995, No. 595, § 1; 1995, No. 1325, § 1; 2001, No. 1429, § 1; 2009, No. 1491, § 1.

**A.C.R.C. Notes.** Pursuant to § 1-2-207, this section is set out above as amended by Acts 1995, No. 1325. This section was also amended by Acts 1995, No. 595, to read as follows:

“(a) Except as provided in subsection (d) of this section or unless authorized by and subject to such conditions as prescribed by the Governor, or his designee, or the Bureau of Alcohol, Tobacco and Firearms of the United States Treasury Department, or other bureau or office designated by the Treasury Department, no person shall possess or own any firearm who has been:

“(1) Convicted of a felony; or

“(2) Adjudicated mentally ill; or

“(3) Committed involuntarily to any mental institution.

“(b) A determination by a jury or a court in circuit court that a person committed a felony shall constitute a conviction even though the person was placed on probation, received suspension of imposition or execution of sentence, had his

conviction expunged pursuant to any act, or was entitled to have his conviction expunged pursuant to any act, except that a person who pleads guilty or nolo contendere or is found guilty of a felony in circuit court may lawfully possess a firearm only if his right to do so is subsequently restored by the Governor pursuant to either subsection (d)(1) or subsection (d)(2) of this section or is otherwise authorized pursuant to subsection (a) of this section.

“(c)(1) A person who violates this section commits a Class B felony if he has been convicted of a felony.

“(2) Otherwise, he commits a Class A misdemeanor.

“(d) The Governor shall have authority to restore the right of a convicted felon to own and possess a firearm:

“(1) by granting a pardon explicitly restoring the right of the person to possess a firearm; or

“(2) without granting a pardon, upon the recommendation of the chief law enforcement officer in the jurisdiction in which the person resides, so long as the underlying felony did not involve the use of a weapon and occurred more than three (3) years ago.”

**Publisher's Notes.** Acts 1995, No. 1325, became law without the Governor's signature.

## RESEARCH REFERENCES

**ALR.** Construction and Application of United States Supreme Court Holdings in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) Respecting Second Amendment

Right to Keep and Bear Arms, to State or Local Laws Regulating Firearms or Other Weapons. 64 A.L.R.6th 131.

Validity of State Gun Control Legislation Under State Constitutional Provisions Securing Right to Bear Arms — Convicted Felons. 85 A.L.R.6th 641.

What Constitutes "Possession" of Firearm for Purposes of 18 U.S.C. § 924(c)(1), Providing Penalty for Possession of Firearm in Furtherance of Drug Trafficking Crime or Crime of Violence. 89 A.L.R. Fed. 2d 37 (2014).

**U. Ark. Little Rock L.J.** DeSimone, Survey of Criminal Law, 3 U. Ark. Little Rock L.J. 191.

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## CASE NOTES

### ANALYSIS

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### Constitutionality.

This section is not an unconstitutional statute based on status since it does not punish the status of being a felon but rather punishes the act of carrying a firearm by one who has been convicted of a felony. *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981).

The legislature could constitutionally provide that any person who had previously been convicted of a felony as defined by this section could not thereafter possess or own a firearm, and this section did not operate as an ex-post facto law when applied to a felon convicted prior to passage of the section. *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984).

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), does not compel the reversal of *Ferguson v. State*, 362 Ark. 547, 210 S.W.3d 53 (2003), because whether a prior felony was violent in nature is a matter of law for the trial court; moreover, the jury did not have to determine the fact of a prior conviction. *Austin v. State*, 98 Ark. App. 380, 255 S.W.3d 888 (2007).

### Purpose.

The purpose of this section is to keep firearms out of the hands of persons who have been formally adjudicated as irresponsible or dangerous. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

### Arrest.

Regardless of whether the information or warrant were defective, a warrant was not required for the defendant's arrest on charges of being a felon in possession of a firearm, a Class D felony under this section, since Ark. R. Crim. P. 4.1 provides that a law enforcement officer may arrest a person without a warrant if he has reasonable cause to believe that that person has committed a felony. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

### Authorization.

The "authorization" clause in subsection (a), permitting a felon to possess a firearm if authorized by the Governor, his designee, or the Treasury Department, creates a defense, as defined by § 5-1-111, rather than an element to be proved by the state. *Fendley v. State*, 314 Ark. 435, 863 S.W.2d 284 (1993).

### Constructive Possession.

Actual physical possession is not necessary for conviction, nor is ownership; the evidence is sufficient if it is shown, by either direct or circumstantial evidence, that the defendant had the right to exercise control over the object. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Where the gun was found in the defendant's bedroom, directly under a window in which the police officers had observed the defendant looking out when they drove up, the officers saw no other person in that room, and one of the officers testi-



fied that he saw the defendant fumbling around with something that could have been a gun, there was substantial evidence from which a jury could infer that the defendant had knowledge of the gun's presence and a right to control it. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Where there is joint occupancy of premises, mere occupancy is insufficient to convict one of possession of contraband, unless there are additional factors linking the defendant with the contraband. *Kandur v. State*, 20 Ark. App. 194, 726 S.W.2d 682 (1987).

Evidence held insufficient to convict. *Kandur v. State*, 20 Ark. App. 194, 726 S.W.2d 682 (1987).

Where defendant occupied the truck with the driver, and the shotgun was located in plain view between the seats, which made it immediately accessible to her and subject to her control, this was sufficient to constitute constructive possession. *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994).

When possession of contraband is an element of an offense, the State need not prove literal, physical possession; constructive possession can be implied when the contraband is in the joint control of the accused and another person. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Joint occupancy of the vehicle, standing alone, is not sufficient to establish possession of contraband; there must be some other factor linking the accused to the contraband. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Among the "linking" factors this court has considered in cases involving vehicles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with accused's personal effects; (3) whether the contraband is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; (5) whether the accused acted suspiciously before or during the arrest. Courts have also considered the improbability that anyone other than the occupants of the vehicle placed the contraband in the vehicle; and the improbable nature of the accused's explanation for his journey. *Kil-*

*patrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

When there is joint occupancy of a residence, additional factors must be proven linking the accused to the firearm. *Killian v. State*, 60 Ark. App. 127, 959 S.W.2d 432 (1998).

Where gun owned by defendant's girlfriend was found in the girlfriend's house, where defendant also lived, defendant's remark to police that the gun should have been hidden better was a sufficient additional factor to link the defendant to the gun. *Killian v. State*, 60 Ark. App. 127, 959 S.W.2d 432 (1998).

Front passenger's conviction for constructive possession of gun was reversed where, although the gun was under his seat, it was more readily available to driver; however, the rear passenger's conviction was upheld because he was in close proximity to the gun that was found under the rear seat and he had behaved suspiciously by giving the police different dates of birth and repeatedly identifying himself as someone else. *Gamble v. State*, 82 Ark. App. 216, 105 S.W.3d 801 (2003).

Evidence showed that defendant signed the ticket to pawn a gun, which constituted circumstantial evidence that defendant constructively possessed the firearm; the pawn ticket indicated that defendant had given a security interest in the gun, and the pawn shop owner's testimony made it clear that only defendant could have redeemed the pawn ticket and retrieved the gun. *Loar v. State*, 368 Ark. 171, 243 S.W.3d 923 (2006).

Conviction for being a felon in possession of a firearm was reversed as, although defendant was a felon, the state failed to show constructive possession; despite the fact that a gun was found in a jointly occupied apartment, nothing showed that defendant had care, control, and management over the contraband. *Williams v. State*, 95 Ark. App. 307, 236 S.W.3d 519 (2006).

Defendant was properly convicted of being a felon in possession of a firearm because there was sufficient evidence that he constructively possessed a gun where he consented to a search of his house and anything on the property, the gun was in his aunt's truck in plain view, located in close proximity to defendant's personal effects, he exercised regular control over the truck, and, although he was not in it

at the time the gun was discovered, he had driven it on the morning that the gun was found. *White v. State*, 2014 Ark. App. 587, 446 S.W.3d 193 (2014).

### **Conviction.**

#### **—In General.**

A prior Supreme Court ruling on a completely different statute did not justify the defendant's reliance on alleged "mistake of law" in assuming his suspended sentence did not constitute a "conviction" under this section prohibiting felons from carrying firearms. *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984).

A prior felony offense of aggravated assault was properly used to establish the defendant's previous felony conviction in a later prosecution for felon in possession of a firearm, notwithstanding that, at the time the defendant was placed on probation for aggravated assault, the court stated that he would be eligible for expungement of his conviction upon successful completion of his probationary period and that the defendant completed his sentence without violating any condition of his probation, since, at the time he was placed on probation. *Edwards v. State*, 70 Ark. App. 127, 15 S.W.3d 358 (2000).

#### **—Proof.**

As a prior felony conviction was an element of the offense, it was certainly not improper for the prosecutor to refer to the previous conviction prior to the introduction of direct proof so long as competent evidence was later presented to support the statement. *Plummer v. State*, 270 Ark. 11, 603 S.W.2d 402 (1980).

Where the defendant was charged with being a felon in possession of a firearm, the very nature of the crime charged necessarily placed the defendant on notice that the state would be required to prove that he was a felon, and therefore, the trial court did not abuse its discretion when it allowed the state to introduce documents concerning the defendant's prior felony convictions. *Terry v. State*, 9 Ark. App. 38, 652 S.W.2d 634 (1983).

A prior felony conviction was relevant evidence in a prosecution for possession of a firearm by a felon in that it was an element of the crime, and the trial court's decision that the State could elect to introduce evidence of one prior conviction rather than another was not an abuse of

discretion; the defendant's contention that he should be permitted to select the prior conviction to be introduced by the State was not tenable. *Clinkscale v. State*, 15 Ark. App. 166, 690 S.W.2d 740 (1985).

Where defendant was charged with being a felon in possession of a firearm, proof of one prior felony conviction would have been sufficient. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Proof of a prior felony is an element of the crime of felon in possession of a firearm and must be proven beyond a reasonable doubt by the state. To require an accused to prove expungement of his record after completion of his sentence under the Youthful Offender Alternative Service Act would be to require an affirmative defense when none is required by the section. *Irvin v. State*, 301 Ark. 416, 784 S.W.2d 763 (1990) (decision under prior law).

Several convictions, including one for being a violent felon in possession of a firearm under this section, were reversed because a trial court erred by refusing to accept defendant's stipulation to having a prior felony; the court should not have informed the jury that the prior conviction was violent and allowed publication to the jury. *Austin v. State*, 98 Ark. App. 380, 255 S.W.3d 888 (2007).

### **Evidence.**

Impeachment of defendant with remarks made by defendant's attorney during opening statement held not abuse of discretion. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

Evidence held sufficient to uphold conviction. *Holbird v. State*, 301 Ark. 382, 784 S.W.2d 171 (1990); *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Evidence held sufficient to support the jury's determination that the appellant was in possession of the controlled substance and a firearm. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Evidence was sufficient to show that the defendant was the same person who had a felony conviction from Texas and, therefore, was sufficient to support a conviction for being a felon in possession of a firearm. *Leatherwood v. State*, 69 Ark. App. 233, 11 S.W.3d 571 (2000).

Where police seized a rifle in defendant's home during the execution of a search warrant, defendant was properly



convicted of one count of felon in possession of a firearm. *McDonald v. State*, 354 Ark. 216, 119 S.W.3d 41 (2003).

Where appellant was convicted of two hotel robberies, the trial court properly convicted him of aggravated robbery, rape, being a felon in possession of a firearm, and being a habitual offender. The State alleged that appellant had prior felony convictions. *Townsend v. State*, 355 Ark. 248, 134 S.W.3d 545 (2003).

In defendant's trial for aggravated assault on a family member and felon in possession of a firearm, defendant challenged the State's proof only as to actual possession of the gun and, despite the fact that defendant's parents' later recanted their written statements that defendant was the one with the gun, that credibility determination was for the fact finder and the evidence was sufficient to support defendant's conviction. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

Although defendant admitted at trial that she possessed the two firearms because they were evidence to prove that she did not commit arson in another criminal case in which the charges against her had been dismissed the year before, she argued that she should not be convicted pursuant to § 5-2-604(a) since her possession of the firearms was justifiable; however, there was no proof of extraordinary attendant circumstances in defendant's case requiring emergency measures to avoid any sort of imminent public or private injury, as required under § 5-2-604 and, thus, there was no reason for giving a jury instruction on the choice-of-evils defense. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004).

Defendant's convictions for first-degree murder, a terroristic act, and possession of firearms by certain persons were proper where the jury believed the witnesses' testimony that defendant fired the only shots and fired toward the group where the victim was standing and toward the nightclub. *Jackson v. State*, 363 Ark. 311, 214 S.W.3d 232 (2005).

Evidence was sufficient to sustain a conviction for possession of firearms by certain persons and to corroborate the accomplice's testimony where witnesses testified as to the role defendant played in the robbery and described his clothing and weapon, which were collected at the scene; further, defendant's jacket had blood

stains on it and a hole corresponding to the location of a gunshot wound he received, and defendant was found hiding inside a dumpster near the site where his car became stuck in the mud. *Flowers v. State*, 92 Ark. App. 29, 210 S.W.3d 907 (2005).

Sufficient evidence supported the conclusion that a defendant was in possession of a gun and that defendant was a convicted felon: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot a victim with that gun, and the record showed that defendant had been convicted of three prior felonies. *Hawkins v. State*, 2009 Ark. App. 675 (2009).

Defendant found guilty on three counts of attempted first-degree murder, of being a felon in possession of a firearm, and three counts of committing a terroristic act unsuccessfully argued that substantial evidence did not support his convictions; while the evidence was circumstantial, substantial evidence supported the conclusion that defendant committed the crimes in question. Moments after the shooting, a dark-colored car was observed speeding away from the area without its lights on even though it was dark outside, that car crashed into another vehicle five blocks from the shooting, a witness positively identified defendant as the person who emerged from the driver's side of the car carrying a long rifle, shell casings from a rifle were recovered from the scene of the shooting, defendant's DNA was found on the driver's side airbag of the car, and the car contained a letter addressed to defendant. *Smith v. State*, 2010 Ark. App. 216 (2010).

When a rape victim testified at defendant's probation revocation hearing that he had a gun at the time of the rape, that testimony was sufficient for the court to find that he had possessed a firearm within the meaning of this section and the definition of "possess" in § 5-1-102. *Craig v. State*, 2010 Ark. App. 309 (2010).

Evidence was sufficient to support defendant's conviction for possession of a firearm by certain persons, in violation of this section, as a firearm was observed in plain view next to defendant in a truck that he was riding in; the evidence showed that defendant was in constructive possession, if not actual possession, of the



weapon. *Hancock v. State*, 2012 Ark. App. 338 (2012).

Defendant's conviction for possession of a firearm by a convicted felon under this section was sufficiently supported by evidence from a friend that he had seen defendant shoot the rifle although the rifle belonged to defendant's father and it was at his friend's house for shooting a raccoon. *Fraser v. State*, 2012 Ark. App. 598 (2012).

Defendant's conviction for possession of a firearm by a felon, in violation of this section, was supported by the evidence because defendant lived alone in a cabin for a week in which there was a gun in plain sight right in front of the door; although defendant denied being aware of the gun, the jury was not required to believe defendant's testimony. *Magness v. State*, 2012 Ark. App. 609, 424 S.W.3d 395 (2012).

Evidence was sufficient to convict defendant of possession of firearms by certain persons because defendant was stopped in close proximity to where there was a report of shots fired; moreover, he was driving a silver vehicle and wearing jeans with no shirt, which matched the description given. When confronted with the prospect of being tested for gunshot residue, defendant exhibited aggressive behavior and was observed wiping his hands, which could have interfered with the testing. *Moore v. State*, 2013 Ark. App. 582 (2013).

Substantial evidence supported defendant's conviction of being a felon in possession of a firearm, given that a certified copy of his felony robbery conviction had been entered into evidence and he admitted to being in possession of a firearm and that he shot the victim. *Toombs v. State*, 2015 Ark. App. 71 (2015).

### **Expungement of Prior Felony.**

A count charging the defendant with being a felon in possession of a firearm was properly dismissed since the underlying felony could not be used by the state because that felony had been lawfully sealed and expunged. *State v. Ross*, 344 Ark. 364, 39 S.W.3d 789 (2001).

Defendant could not be convicted of being a felon in possession of a firearm when his only felony conviction had been properly expunged. *State v. Warren*, 345 Ark. 508, 49 S.W.3d 103 (2001).

Trial court did not err by admitting defendant's prior conviction for felony possession of drug paraphernalia into evidence as proof on a charge of possession of a firearm by a felon (FIP) because defendant's expunged felony conviction could be used as proof on his FIP charge under former version of section; although still uncodified, 1995 Act No. 595, § 1 indicated legislative intent for an expunged felony conviction to remain a conviction for the purposes of possession of a firearm by a felon. *Smith v. State*, 2011 Ark. App. 539 (2011) (decision under prior law).

### **Intent.**

In prosecution for the offense of felon in possession of a firearm, whether the defendant believed that it was legal for a felon to possess a firearm after the completion of his parole was irrelevant. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

### **Involuntary Commitment.**

Although appellant argued that the circuit court erred in denying his motion to dismiss because appellant had not been adjudicated mentally ill or involuntarily committed to a mental institution within the meaning of subsection (a) of this section, this point was not properly before the Supreme Court on appeal from a conditional plea. *Gooch v. State*, 2015 Ark. 227, 463 S.W.3d 296 (2015).

### **Lesser-Included Offenses.**

Since the offense of possession of a firearm by a felon requires proof that the person possessing the firearm has been convicted of a felony and that fact is not an element in the proof of aggravated robbery, the lesser offense is not included in aggravated robbery. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983), cert. denied, 472 U.S. 1019, 105 S. Ct. 3482, 87 L. Ed. 2d 617 (1985).

### **Preservation for Review.**

Although appellant argued that subdivision (a)(3) of this section was void for vagueness, deprived him of due process, and violated the Second Amendment and Ark. Const. art. 2, § 5, these points were not raised below and ruled on by the circuit court, and the Supreme Court did not reach the merits of appellant's arguments. *Gooch v. State*, 2015 Ark. 227, 463 S.W.3d 296 (2015).

### Sentencing.

The nature of the prior felony and the facts surrounding the incident leading to defendant's arrest do reflect on the seriousness of the crime and are relevant in the determination of sentence, and if these factors were not meant to be considered in sentencing, the General Assembly could have provided for imprisonment for a definite term upon conviction of a felon for possession of a firearm rather than allowing the jury to impose any sentence not in excess of five years. *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980).

The state can use the defendant's prior felony convictions to convict him of felon in possession of a firearm and then use the same prior felony convictions to enhance the penalty for that conviction. The defendant was not convicted of two offenses which share the same elements, and thus he was not twice put in jeopardy for the same offense. *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

*State v. Lawson*, 295 Ark. 37, 746 S.W.2d 544 (1988), prohibits "stacking" of specific subsequent-offense penalty enhancements like the one in the driving while impaired statute, which operates to convert a misdemeanor to a felony because of multiple recurrences of the same underlying offense within a specified period of time; the Court of Appeals of Arkansas, Division One, declines to expand *Lawson* past that boundary. Therefore, there was no impermissible stacking of a specific firearm enhancement statute for a felon in possession of a firearm under subdivision (c)(1) of this section with the general habitual-offender enhancement statute under § 5-4-501(b)(2)(C); subdivision (c)(1) did not contain an enhancement for recidivism, there was no greater sentence than if either statute was applied singly, and the designation of the possession offense as a Class B felony was not an enhancement. *Moore v. State*, 2012 Ark. App. 662 (2012).

Because defendant's sentence for felon-in-possession/using firearm to commit another felony under subdivision (c)(1)(B) of this section was not enhanced by the statute defining the crime, the trial court did not err by applying the enhancement in § 16-90-120(a) for using a firearm to commit a felony. *Stubblefield v. State*, 2013 Ark. App. 734 (2013).

Under Arkansas law, possession of a firearm by a felon is at most a class B felony, punishable by no more than 20 years. Unless the flight causes serious physical injury to another, fleeing by vehicle is at most a class D felony, punishable by up to six years. *United States v. Thomas*, 790 F.3d 784 (8th Cir. 2015).

### Trial Proceedings.

Where during closing arguments the prosecuting attorney pled with the jurors to enforce the law and send a message out to other drug-traffickers in the county that that kind of conduct is not going to be tolerated, the defendant objected but did not ask for a mistrial, and the trial court sustained the objection and admonished the jury that arguments of counsel were not evidence and that they should disregard any statements by counsel which were not supported by the evidence, there was no error. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

The trial judge erred in refusing to sever a firearm/felon count from a murder count for trial; an offense based in part on a prior conviction is not part of a single scheme or plan with first degree murder, as Ark. R. Crim. P. 22.2(a) requires, nor do the two offenses require the same evidence, which would be an alternative reason for upholding the trial judge's decision to deny severance. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Where the trial of a felon/firearm charge with a murder charge was prejudicial error, the circuit court abused its discretion in denying a motion to sever; accordingly, defendant was prejudiced by the joinder and was entitled to a new trial. *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993).

Where defendant offered to stipulate to the convicted-felon element of the felon-in-possession-of-a-firearm charge, the state's introduction of the certified copy of defendant's conviction was unfairly prejudicial and should have been excluded; the right of the state to prove its case had to be balanced against the right of a defendant to a trial free from unfair prejudice. *Ferguson v. State*, 362 Ark. 547, 210 S.W.3d 53 (2005).

**Cited:** *Shelton v. State*, 271 Ark. 342, 609 S.W.2d 18 (1980); *Terry v. State*, 271 Ark. 715, 610 S.W.2d 272 (1981); *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981);



Bradley v. Bureau of Alcohol, Tobacco & Firearms, 736 F.2d 1238 (8th Cir. 1984); Henderson v. State, 16 Ark. App. 225, 699 S.W.2d 419 (1985); Beasley v. State, 29 Ark. App. 104, 777 S.W.2d 865 (1989); Ussery v. State, 308 Ark. 67, 822 S.W.2d 848 (1992); State v. Mosley, 313 Ark. 616, 856 S.W.2d 623 (1993); Kanig v. State, 321

Ark. 515, 905 S.W.2d 847 (1995); Polk v. State, 329 Ark. 174, 947 S.W.2d 758 (1997); Travis v. State, 331 Ark. 7, 959 S.W.2d 32 (1998); Timmons v. State, 81 Ark. App. 219, 100 S.W.3d 52 (2003); Smith v. State, 85 Ark. App. 475, 157 S.W.3d 566 (2004); Butler v. State, 2011 Ark. App. 708 (2011).

### 5-73-104. Criminal use of prohibited weapons.

(a) A person commits the offense of criminal use of prohibited weapons if, except as authorized by law, he or she uses, possesses, makes, repairs, sells, or otherwise deals in any:

- (1) Bomb;
- (2) Machine gun;
- (3) Sawed-off shotgun or rifle;
- (4) Firearm specially made or specially adapted for silent discharge;
- (5) Metal knuckles; or
- (6) Other implement for the infliction of serious physical injury or death.

(b) It is a defense to prosecution under this section that:

(1) The defendant was a law enforcement officer, prosecuting attorney, deputy prosecuting attorney, prison guard, or member of the armed forces acting in the course and scope of his or her duty at the time he or she used or possessed the prohibited weapon; or

(2) The defendant used, possessed, made, repaired, sold, or otherwise dealt in any article enumerated in subsection (a) of this section under circumstances negating any likelihood that the weapon could be used as a weapon.

(c)(1) Criminal use of prohibited weapons is a Class B felony if the weapon is a bomb, machine gun, or firearm specially made or specially adapted for silent discharge.

(2) Criminal use of prohibited weapons is a Class A misdemeanor if the offense is possession of metal knuckles.

(3) Otherwise, criminal use of prohibited weapons is a Class D felony.

**History.** Acts 1975, No. 280, § 3104; A.S.A. 1947, § 41-3104; Acts 1993, No. 1189, § 7; 2005, No. 1994, § 438; 2011, No. 161, § 1; 2013, No. 539, § 1.

**A.C.R.C. Notes.** Acts 1993, No. 1189, § 1, provided: “(a) The General Assembly of the State of Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by school age juveniles and the growth of street gangs made up largely of school age juveniles. The General Assembly of the State of Arkansas further finds that the

number of school related crimes is increasing.

“(b) It is the intent of the General Assembly of the State of Arkansas to insure the safest possible learning environment for our students, teachers and other school employees.”

**Amendments.** The 2011 amendment inserted (c)(2) and redesignated former (c)(2) as (c)(3).

The 2013 amendment inserted “prosecuting attorney, deputy prosecuting attorney” in (b)(1).



## CASE NOTES

## ANALYSIS

Constitutionality.  
Construction.  
Evidence.  
Grenade.  
Proof.  
Sawed-off Shotgun.

**Constitutionality.**

This section is not unconstitutionally vague. *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990); *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

**Construction.**

This section does not create a strict liability offense; under § 5-2-203(b), if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

Defendant may be guilty of criminal use of a prohibited weapon under this section but innocent of possession of a defaced firearm under § 5-73-107. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

District court misapplied the categorical approach to determining whether defendant's prior adjudication of juvenile delinquency involved a "violent felony" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii). Defendant was adjudicated a delinquent for violating this section, but it could not be determined from the record whether defendant violated this section by possessing a sawed-off rifle or some "other implement" such as a knife; while possession of a sawed-off rifle was a violent felony, it did not necessarily follow that possession of every weapon prohibited by this section would qualify. *United States v. King*, 598 F.3d 1043 (8th Cir. 2010).

### **5-73-105. Legitimate manufacture, repair, and transportation of prohibited weapons.**

Section 5-73-104 shall not be construed to prohibit the manufacture, repair, transportation, or sale of the weapons enumerated in § 5-73-104 to or for an authorized representative of:

**Evidence.**

Evidence held sufficient to support conviction. *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987); *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Evidence held sufficient to support the conviction for criminal use of a prohibited weapon and aggravated assault. *Robinson v. State*, 49 Ark. App. 58, 896 S.W.2d 442 (1995).

**Grenade.**

Although the information described the device found in defendant's possession as a grenade, the prosecutor argued that the device was a bomb, and the witnesses identified the object variously as a bomb and a grenade, conviction for a violation of this section was upheld where the testimony also clearly established the object fell under the umbrella of "other implement" as that term is used in subsection (a) of this section. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

**Proof.**

The "Use of Prohibited Weapons" section does not create a strict liability offense. It requires proof of a culpable mental state. *State v. Setzer*, 302 Ark. 593, 791 S.W.2d 365 (1990).

**Sawed-off Shotgun.**

A shotgun with a barrel shortened by cutting off a portion thereof constitutes a "sawed-off shotgun." *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Possession of a sawed-off shotgun was similar, in kind as well as degree of risk posed, to the offenses listed in 18 U.S.C. § 924(e); thus, the district court did not err by finding that defendant's 1994 conviction for possession of a sawed-off shotgun was an Armed Career Criminal Act-qualifying felony. *United States v. Vincent*, 575 F.3d 820 (8th Cir. 2009), cert. denied, 560 U.S. 927, 130 S. Ct. 3320, 176 L. Ed. 2d 1225 (2010).

**Cited:** *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989).

- (1) The armed forces; or
- (2) Any law enforcement agency.

**History.** Acts 1975, No. 280, § 3105;  
A.S.A. 1947, § 41-3105.

### **5-73-106. Defacing a firearm.**

(a) A person commits the offense of defacing a firearm if he or she knowingly removes, defaces, mars, covers, alters, or destroys the manufacturer's serial number or identification mark of a firearm.

(b) Defacing a firearm is a Class D felony.

**History.** Acts 1975, No. 280, § 3106;  
A.S.A. 1947, § 41-3106.

### **5-73-107. Possession of a defaced firearm.**

(a) A person commits the offense of possession of a defaced firearm if he or she knowingly possesses a firearm with a manufacturer's serial number or other identification mark required by law that has been removed, defaced, marred, altered, or destroyed.

(b) It is a defense to a prosecution under this section that the person reported the possession to the police or other governmental agency prior to arrest or the issuance of an arrest warrant or summons.

(c)(1) Possession of a defaced firearm is a Class D felony.

(2) However, possession of a defaced firearm is a Class A misdemeanor if the manufacturer's serial number or other identification mark required by law is merely covered or obstructed, but still retrievable.

**History.** Acts 1975, No. 280, § 3107;  
A.S.A. 1947, § 41-3107; Acts 1995, No.  
1202, § 1.

## **CASE NOTES**

### **ANALYSIS**

Construction.

Firearm Enhancement.

### **Construction.**

Defendant may be guilty of criminal use of a prohibited weapon under § 5-73-104 but innocent of possession of a defaced firearm under this section. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

### **Firearm Enhancement.**

Firearm enhancement, pursuant to subsection (a) of § 16-90-120, of defendant's conviction under this section for possessing a defaced firearm was not an illegal sentence, even though the underlying conviction necessarily involved the possession of a firearm. *Hinton v. State*, 2015 Ark. 479, 477 S.W.3d 517 (2015).

**5-73-108. Criminal acts involving explosives.**

(a)(1) A person commits the offense of criminal possession of explosive material or a destructive device if the person:

(A) Sells, possesses, manufactures, transfers, or transports explosive material or a destructive device; and

(B) Either:

(i) Has the purpose of using that explosive material or destructive device to commit an offense; or

(ii) Knows or should know that another person intends to use that explosive material or destructive device to commit an offense.

(2) Criminal possession of explosive material or a destructive device is a Class B felony.

(b)(1) A person commits the offense of criminal distribution of explosive material if he or she knowingly distributes explosive material to any individual who:

(A) Has pleaded guilty or nolo contendere to or been found guilty of a crime in state or federal court punishable by imprisonment for a term exceeding one (1) year;

(B) Is a fugitive from justice;

(C) Is an unlawful user of or addicted to any controlled substance;

(D) Has been adjudicated as having a mental disease or defect or has been committed to an institution or residential treatment facility because of a mental disease or defect;

(E) Is under twenty-one (21) years of age;

(F) Is an alien, other than an alien who is:

(i) Lawfully admitted for permanent residence as defined in 8 U.S.C. § 1101(a)(20), as it existed on January 1, 2009;

(ii) In lawful nonimmigrant status, a refugee admitted under 8 U.S.C. § 1157, as it existed on January 1, 2009, or in asylum status under 8 U.S.C. § 1158, as it existed on January 1, 2009, and either:

(a) A foreign law enforcement officer of a friendly foreign government, as determined by the United States Secretary of State under 18 U.S.C. § 842, entering the United States on official law enforcement business, and the distribution of explosive material is in furtherance of this official law enforcement business; or

(b) A person having the power to direct or cause the direction of the management and policies of a corporation, partnership, or association licensed under 18 U.S.C. § 843, as it existed on January 1, 2009, and the distribution of explosive material is in furtherance of the person's power;

(iii) A member of a North Atlantic Treaty Organization or other friendly foreign military force, as determined by the United States Attorney General in consultation with the United States Secretary of Defense under 18 U.S.C. § 842, who is present in the United States under military orders for training or other military purpose authorized by the United States, and the distribution of explosive material is in furtherance of the military orders for training or authorized military purpose; or



(iv) Lawfully present in the United States in cooperation with the Director of the Central Intelligence Agency, and the distribution of explosive material is in furtherance of the cooperation;

(G) Has been dishonorably discharged from any branch of the United States Armed Forces; or

(H) Has renounced his or her United States citizenship.

(2) Criminal distribution of explosive material is a Class C felony.

(c)(1) A person commits the offense of possession of stolen explosive material if he or she:

(A) Receives, possesses, transports, ships, conceals, stores, barter, sells, disposes of, or pledges or accepts as security for a loan any stolen explosive materials; and

(B) Knows or has reasonable cause to believe that the explosive material was stolen.

(2) Possession of stolen explosive material is a Class C felony.

(d)(1) A person commits the offense of unlawful receipt or possession of an explosive material if the person receives or possesses explosive material and:

(A) Has pleaded guilty or nolo contendere to or has been found guilty in any state or federal court of a crime punishable by imprisonment for a term exceeding one (1) year;

(B) Is a fugitive from justice;

(C) Is an unlawful user of or addicted to any controlled substance;

(D) Has been adjudicated to have a mental disease or defect or has been committed to an institution or residential treatment facility because of a mental disease or defect;

(E) Is under twenty-one (21) years of age;

(F) Is an alien, other than an alien who is:

(i) Lawfully admitted for permanent residence as defined in 8 U.S.C. § 1101(a)(20), as it existed on January 1, 2009; or

(ii) In lawful nonimmigrant status, a refugee admitted under 8 U.S.C. § 1157, as it existed on January 1, 2009, or in asylum status under 8 U.S.C. § 1158, as it existed on January 1, 2009, and either:

(a) A foreign law enforcement officer of a friendly foreign government, as determined by the United States Secretary of State under 18 U.S.C. § 842, entering the United States on official law enforcement business, and the receipt or possession of the explosive material is in furtherance of this official law enforcement business; or

(b) A person having the power to direct or cause the direction of the management and policies of a corporation, partnership, or association licensed under 18 U.S.C. § 843, as it existed on January 1, 2009, and the receipt or possession of the explosive material is in furtherance of the person's power;

(iii) A member of a North Atlantic Treaty Organization or other friendly foreign military force, as determined by the United States Attorney General in consultation with the United States Secretary of Defense under 18 U.S.C. § 842, who is present in the United States under military orders for training or other military purpose autho-

ized by the United States, and the receipt or possession of the explosive material is in furtherance of the military orders for training or authorized military purpose; or

(iv) Lawfully present in the United States in cooperation with the Director of the Central Intelligence Agency, and the receipt or possession of the explosive material is in furtherance of the cooperation;

(G) Has been dishonorably discharged from any branch of the United States Armed Forces; or

(H) Has renounced his or her United States citizenship.

(2) Unlawful receipt or possession of explosive material is a Class C felony.

(3) It is a defense to prosecution under this subsection if at the time of the receiving or possessing the explosive material the person was acting within the scope of his or her employment with a business authorized to use explosive material.

(e) It is a Class A misdemeanor for any person to store any explosive material in a manner not in conformity with the Arkansas Fire Prevention Code.

(f) A person who commits theft of any explosive material with the purpose to cause harm to a person or property is guilty of a Class B felony.

(g) Any explosive material determined to be contraband is subject to seizure by a law enforcement officer and to being destroyed in conformity with the Arkansas Fire Prevention Code.

(h) As used in this section, “alien” means a person who is not a citizen or national of the United States.

**History.** Acts 1975, No. 280, § 3108; A.S.A. 1947, § 41-3108; Acts 2005, No. 1226, § 2; 2006 (1st Ex. Sess.), No. 14, § 1; 2009, No. 339, § 1; 2011, No. 1120, § 14.

**Amendments.** The 2011 amendment inserted “who is” in (h).

**Cross References.** Arson, § 5-38-301. Duties of State Fire Marshal Enforcement Section, § 12-13-105.

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CASE NOTES

ANALYSIS

Conviction.  
Evidence.

**Conviction.**

Conviction upheld. *Mock v. State*, 20 Ark. App. 117, 725 S.W.2d 1 (1987).

**Evidence.**

Evidence sufficient to support conviction. *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

**5-73-109. Furnishing a deadly weapon to a minor.**

(a) A person commits the offense of furnishing a deadly weapon to a minor if he or she sells, barters, leases, gives, rents, or otherwise furnishes a firearm or other deadly weapon to a minor without the consent of a parent, guardian, or other person responsible for general supervision of the minor's welfare.

(b)(1) Furnishing a deadly weapon to a minor is a Class A misdemeanor.

(2) However, furnishing a deadly weapon to a minor is a Class B felony if the deadly weapon is:

- (A) A handgun;
- (B) A sawed-off or short-barrelled shotgun, as defined in § 5-1-102;
- (C) A sawed-off or short-barrelled rifle, as defined in § 5-1-102;
- (D) A firearm that has been specially made or specially adapted for silent discharge;
- (E) A machine gun;
- (F) An explosive or incendiary device, as defined in § 5-71-301;
- (G) Metal knuckles;
- (H) A defaced firearm, as defined in § 5-73-107; or
- (I) Another implement for the infliction of serious physical injury or death that serves no common lawful purpose.

**History.** Acts 1975, No. 280, § 3109; A.S.A., 1947, § 41-3109; Acts 1994 (2nd Ex. Sess.), No. 45, § 1.

**Cross References.** Contributing to delinquency of a minor, § 5-27-209.

**CASE NOTES****Applicability.**

This section applies to adults and minors; a minor is a "person" within the meaning of this section. *Allstate Ins. Co. v.*

*Burrough*, 120 F.3d 834 (8th Cir. 1997).

**Cited:** *Allstate Ins. Co. v. Burrough*, 914 F. Supp. 308 (W.D. Ark. 1996).

**5-73-110. Disarming minors and mentally defective or mentally irresponsible persons — Disposition of property seized.**

(a) Subject to constitutional limitation, nothing in this section and §§ 5-73-101 — 5-73-109 shall be construed to prohibit a law enforcement officer from disarming, without arresting, a minor or person who reasonably appears to be mentally defective or otherwise mentally irresponsible when that person is in possession of a deadly weapon.

(b) Property seized under subsection (a) of this section shall be:

- (1) Held for seventy-two (72) hours by the law enforcement agency employing the law enforcement officer who seized the property; and
- (2) After the seventy-two-hour hold and upon request and presentation of valid proof of ownership, returned to the:

(A) Owner, if he or she is eighteen (18) years of age or older and may lawfully possess the property; or



(B) Parent or legal guardian of the owner, if the owner is a minor and the parent or legal guardian may lawfully possess the property.

**History.** Acts 1975, No. 280, § 3110; **Amendments.** The 2015 amendment A.S.A. 1947, § 41-3110; Acts 2015, No. 688, § 1. rewrote (b).

### **5-73-111. Unlawful procurement of a firearm.**

(a) As used in this section:

(1) “Ammunition” means any cartridge, shell, or projectile designed for use in a firearm;

(2) “False information” means information that portrays an unlawful transaction as lawful or a lawful transaction as unlawful;

(3) “Licensed dealer” means a person who is licensed under 18 U.S.C. § 923, as it existed on January 1, 2013, to engage in the business of dealing in firearms; and

(4) “Private seller” means a person other than a licensed dealer who sells or offers for sale a firearm or ammunition.

(b) A person commits the offense of unlawful procurement of a firearm or ammunition if he or she knowingly:

(1) Solicits, persuades, encourages, or entices a licensed dealer or private seller to transfer a firearm or ammunition under unlawful circumstances; or

(2) Provides false information to a licensed dealer or private seller with a purpose to deceive the licensed dealer or private seller concerning the lawfulness of a transfer of a firearm or ammunition.

(c) It is a defense to prosecution under this section if the person is:

(1) A law enforcement officer acting in his or her official capacity; or

(2) Acting at the direction of a law enforcement officer.

(d) Unlawful procurement of a firearm or ammunition is a Class D felony.

**History.** Acts 2013, No. 507, § 1.

### **5-73-112. Certification by a chief law enforcement officer regarding receipt or manufacture of a firearm.**

(a) As used in this section:

(1) “Certification” means the participation and assent of the chief law enforcement officer or his or her designee necessary under federal law for the approval of an application to transfer or manufacture a firearm; and

(2) “Firearm” means the same as defined in § 5845(a) of the National Firearms Act, 26 U.S.C. § 5801 et seq. as it existed on January 1, 2015.

(b)(1) When certification by the chief law enforcement officer of a jurisdiction is required by federal law or regulation for the transfer or manufacture of a firearm within fifteen (15) days of receipt of a request for certification, the chief law enforcement officer or his or her designee shall provide the certification if the applicant is not prohibited by law

from receiving or manufacturing the firearm or is not the subject of a proceeding that could result in the applicant's being prohibited by law from receiving or manufacturing the firearm.

(2) If the applicant is prohibited by law from receiving or manufacturing the firearm or is the subject of a proceeding that could result in a prohibition against his or her receiving or manufacturing the firearm, the chief law enforcement officer or his or her designee shall provide written notification to the applicant that states the reasons for his or her findings and that the certification is denied.

(c)(1) An applicant whose request for certification is denied may appeal the denial to the circuit court where the applicant resides.

(2) The circuit court shall review the denial de novo.

(3) If the circuit court finds that the applicant is not prohibited by law from receiving or manufacturing the firearm or is not the subject of a proceeding that could result in a prohibition against his or her receiving or manufacturing the firearm, the circuit court shall order the chief law enforcement officer to issue the certification to the applicant.

(d) Except as provided in subdivision (c)(3) of this section, the chief law enforcement officer of a jurisdiction and his or her employees who act in good faith are immune from civil liability arising from any act or omission in making a certification under this section.

**History.** Acts 2015, No. 720, § 1.

### **5-73-113 — 5-73-118. [Reserved.]**

### **5-73-119. Handguns — Possession by minor or possession on school property.**

(a)(1) No person in this state under eighteen (18) years of age shall possess a handgun.

(2)(A) A violation of subdivision (a)(1) of this section is a Class A misdemeanor.

(B) A violation of subdivision (a)(1) of this section is a Class D felony if the person has previously:

(i) Been adjudicated delinquent for a violation of subdivision (a)(1) of this section;

(ii) Been adjudicated delinquent for any offense that would be a felony if committed by an adult; or

(iii) Pleaded guilty or nolo contendere to or been found guilty of a felony in circuit court while under eighteen (18) years of age.

(b)(1) No person in this state shall possess a firearm:

(A) Upon the developed property of a public or private school, kindergarten through grade twelve (K-12);

(B) In or upon any school bus; or

(C) At a designated bus stop as identified on the route list published by a school district each year.

(2)(A) A violation of subdivision (b)(1) of this section is a Class D felony.

(B) No sentence imposed for a violation of subdivision (b)(1) of this section shall be suspended or probated or treated as a first offense under § 16-93-301 et seq.

(c)(1) Except as provided in § 5-73-322, a person in this state shall not possess a handgun upon the property of any private institution of higher education or a publicly supported institution of higher education in this state on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ the handgun as a weapon against a person.

(2) A violation of subdivision (c)(1) of this section is a Class D felony.

(d) “Handgun” means a firearm capable of firing rimfire ammunition or centerfire ammunition and designed or constructed to be fired with one (1) hand.

(e) It is permissible to carry a handgun under this section if at the time of the act of possessing a handgun or firearm:

(1) The person is in his or her own dwelling or place of business or on property in which he or she has a possessory or proprietary interest, except upon the property of a public or private institution of higher learning;

(2) The person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties;

(3) The person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces;

(4) The person is a registered commissioned security guard acting in the course and scope of his or her duties;

(5) The person is hunting game with a handgun or firearm that may be hunted with a handgun or firearm under the rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun or firearm;

(6) The person is a certified law enforcement officer;

(7) The person is on a journey beyond the county in which the person lives, unless the person is eighteen (18) years of age or less;

(8) The person is participating in a certified hunting safety course sponsored by the commission or a firearm safety course recognized and approved by the commission or by a state or national nonprofit organization qualified and experienced in firearm safety;

(9) The person is participating in a school-approved educational course or sporting activity involving the use of firearms;

(10) The person is a minor engaged in lawful marksmanship competition or practice or other lawful recreational shooting under the supervision of his or her parent, legal guardian, or other person twenty-one (21) years of age or older standing in loco parentis or is traveling to or from a lawful marksmanship competition or practice or other lawful recreational shooting with an unloaded handgun or



firearm accompanied by his or her parent, legal guardian, or other person twenty-one (21) years of age or older standing in loco parentis;

(11) The person has a license to carry a concealed handgun under § 5-73-301 et seq. and is carrying a concealed handgun on the developed property of:

(A) A kindergarten through grade twelve (K-12) private school operated by a church or other place of worship that:

(i) Is located on the developed property of the kindergarten through grade twelve (K-12) private school;

(ii) Allows the person to carry a concealed handgun into the church or other place of worship under § 5-73-306; and

(iii) Allows the person to possess a concealed handgun on the developed property of the kindergarten through grade twelve (K-12) private school; or

(B) A kindergarten through grade twelve (K-12) private school or a prekindergarten private school that through its governing board or director has set forth the rules and circumstances under which the licensee may carry a concealed handgun into a building or event of the kindergarten through grade twelve (K-12) private school or the prekindergarten private school; or

(12)(A) The person has a license to carry a concealed handgun under § 5-73-301 et seq. and is carrying a concealed handgun in his or her motor vehicle or has left the concealed handgun in his or her locked and unattended motor vehicle in a publicly owned and maintained parking lot.

(B)(i) As used in this subdivision (e)(12), “parking lot” means a designated area or structure or part of a structure intended for the parking of motor vehicles or a designated drop-off zone for children at a school.

(ii) “Parking lot” does not include a parking lot owned, maintained, or otherwise controlled by the Department of Correction or Department of Community Correction.

**History.** Acts 1989, No. 649, §§ 1-4; 1993, No. 1166, § 1; 1993, No. 1189, § 4; 1994 (2nd Ex. Sess.), No. 57, § 1; 1994 (2nd Ex. Sess.), No. 58, § 1; 1999, No. 1282, § 1; 2001, No. 592, § 1; 2005, No. 1994, § 476; 2013, No. 226, § 1; 2013, No. 746, § 1; 2013, No. 1390, § 1; 2015, No. 933, § 1; 2015, No. 1078, § 1.

**A.C.R.C. Notes.** Acts 1993, No. 1189, § 1, provided: “(a) The General Assembly of the State of Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by school age juveniles and the growth of street gangs made up largely of school age juveniles. The General Assembly of the State of Arkansas further finds that the number of school related crimes is in-

creasing.

“(b) It is the intent of the General Assembly of the State of Arkansas to insure the safest possible learning environment for our students, teachers and other school employees.”

**Amendments.** The 2013 amendment by No. 226 added “Except as provided in § 5-73-322” at the beginning of (c)(1).

The 2013 amendment by No. 746 substituted “It is permissible to carry a handgun under this section if” for “It is a defense to prosecution under this section that” in the introductory language of (e); substituted “registered commissioned security guard” for “licensed security guard” in (e)(4); inserted “beyond the county in which the person lives” in (e)(7); and sub-

stituted “a lawful marksmanship competition or practice or other lawful recreational shooting” for “this activity” in (e)(10).

The 2013 amendment by No. 1390 added (e)(11).

The 2015 amendment by No. 933, in (e)(11), added designation (A) and redesignated (e)(11)(A)-(C) as (e)(11)(A)(i)-(iii); and added (e)(11)(B).

The 2015 amendment by No. 1078 added (e)(12).

## RESEARCH REFERENCES

**Ark. L. Rev.** John Thomas Shepherd, Comment: Who Is the Arkansas Traveler?: Analyzing Arkansas’s “Journey” Exception to the Offense of Carrying a Weapon, 66 Ark. L. Rev. 463 (2013).

Thomas Christoph Keller, Comment: ABC’s and AR-15’s: Arming Arkansas’s Teachers, 67 Ark. L. Rev. 687 (2014).

**U. Ark. Little Rock L.J.** Survey, Criminal Law, 12 U. Ark. Little Rock L.J. 617.

## CASE NOTES

### ANALYSIS

Purpose.  
Defenses.  
Evidence.  
Handgun.  
Jurisdiction.

#### **Purpose.**

The intent behind this section is to insure safety at our public schools. S.T. v. State, 318 Ark. 499, 885 S.W.2d 885 (1994); Cole v. State, 323 Ark. 136, 913 S.W.2d 779 (1996).

#### **Defenses.**

In enacting present subdivision (e)(1), the General Assembly availed the affirmative defense, possessory interest in dwellings, to all persons, including juveniles, who violated this section. Lucas v. State, 319 Ark. 752, 894 S.W.2d 891 (1995).

#### **Evidence.**

Evidence failed to link defendant to constructive possession of handgun. Knight v. State, 51 Ark. App. 60, 908 S.W.2d 664 (1995).

#### **Handgun.**

The definition of handgun in present subsection (d) of this section uses the phrase “capable of firing rimfire ammunition or centerfire ammunition” in its first clause, but does not read, “capable of firing at time of possession,” nor does it merely read “capable of firing” without

reference to certain ammunition; the fact that a weapon is inoperable does not prevent it from being a “handgun” as defined by this section. S.T. v. State, 318 Ark. 499, 885 S.W.2d 885 (1994).

The General Assembly used the phrase “capable of firing” and “designed or constructed to be fired” synonymously and interchangeably; thus, if the firearm was designed to fire that particular ammunition, it would qualify as a handgun. S.T. v. State, 318 Ark. 499, 885 S.W.2d 885 (1994).

#### **Jurisdiction.**

Construction of minor in possession of a handgun in violation of present subdivision (a)(1) of this section in tandem with the grant of jurisdiction to juvenile court in § 9-27-306(a)(1) and the definition of “delinquent juvenile” in § 9-27-303 provides the juvenile court with jurisdiction of the handgun charge. Jones v. State, 319 Ark. 762, 894 S.W.2d 591 (1995).

The juvenile court had jurisdiction of delinquency adjudication because it was grounded on possession of a handgun by a person under age 18 years; the intent of the General Assembly was to include violations of this section as delinquent acts, and the omission of the language “or who has violated § 5-73-119” in the definition of “delinquent juvenile” in § 9-27-303, which was enacted in 1989, was a drafting error which was corrected by 1994 legislation. Rosario v. State, 319 Ark. 764, 894 S.W.2d 888 (1995).

**5-73-120. Carrying a weapon.**

(a) A person commits the offense of carrying a weapon if he or she possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person.

(b) As used in this section:

(1) "Club" means any instrument that is specially designed, made, or adapted for the purpose of inflicting serious physical injury or death by striking, including a blackjack, billie, and sap;

(2) "Handgun" means any firearm with a barrel length of less than twelve inches (12") that is designed, made, or adapted to be fired with one (1) hand;

(3) "Journey" means travel beyond the county in which a person lives; and

(4) "Knife" means any bladed hand instrument three inches (3") or longer that is capable of inflicting serious physical injury or death by cutting or stabbing, including a dirk, a sword or spear in a cane, a razor, an ice pick, a throwing star, a switchblade, and a butterfly knife.

(c) It is permissible to carry a weapon under this section if at the time of the act of carrying the weapon:

(1) The person is in his or her own dwelling or place of business or on property in which he or she has a possessory or proprietary interest;

(2) The person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties;

(3) The person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces;

(4) The person is carrying a weapon when upon a journey, unless the journey is through a commercial airport when presenting at the security checkpoint in the airport or is in the person's checked baggage and is not a lawfully declared weapon;

(5) The person is a registered commissioned security guard acting in the course and scope of his or her duties;

(6) The person is hunting game with a handgun that may be hunted with a handgun under rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun;

(7) The person is a certified law enforcement officer;

(8) The person is in possession of a concealed handgun and has a valid license to carry a concealed handgun under § 5-73-301 et seq., or recognized under § 5-73-321 and is not in a prohibited place as defined by § 5-73-306;

(9) The person is a prosecuting attorney or deputy prosecuting attorney carrying a firearm under § 16-21-147; or



(10) The person is in possession of a handgun and is a retired law enforcement officer with a valid concealed carry authorization issued under federal or state law.

(d) Carrying a weapon is a Class A misdemeanor.

**History.** Acts 1975, No. 696, § 1; 1981, No. 813, § 1; A.S.A. 1947, § 41-3151; Acts 1987, No. 266, § 1; 1987, No. 556, § 1; 1987, No. 734, § 1; 1995, No. 832, § 1; 2003, No. 1267, § 2; 2005, No. 1994, § 293; 2013, No. 539, § 2; 2013, No. 746, § 2; 2015, No. 1155, § 14.

**Publisher’s Notes.** Acts 1995, No. 832, became law without the Governor’s signature.

**Amendments.** The 2013 amendment by No. 539 added (c)(9).

The 2013 amendment by No. 746 substituted “to attempt to unlawfully employ” for “to employ” in (a); inserted (b)(3); redesignated former (b)(3)(A) and (3)(B) as (b)(4) and inserted “three inches (3”) or longer”; substituted “It is permissible to carry a handgun under this section if” for

“It is a defense to a prosecution under this section that” in the introductory language of (c); substituted “registered commissioned security guard” for “licensed security guard” in (c)(5); rewrote (c)(8); added (c)(9) (now (c)(10)); and substituted “Carrying a weapon is a Class A misdemeanor” for “(1) Any person who carries a weapon into an establishment that sells alcoholic beverages is guilty of a misdemeanor and subject to a fine of not more than two thousand five hundred dollars (\$2,500) or imprisonment for not more than one (1) year, or both. (2) Otherwise, carrying a weapon is a Class A misdemeanor.” in (d).

The 2015 amendment, in the introductory language of (c), substituted “weapon” for “handgun” and substituted “the weapon” for “a weapon”.

RESEARCH REFERENCES

**ALR.** Validity of airport security measures. 125 A.L.R.5th 281.

**Ark. L. Notes.** Laurent Sacharoff & Jacob Worlow, Open Carry in Arkansas – An Ambiguous Statute, 2014 Ark. L. Notes 1548.

**Ark. L. Rev.** Act 696: Robbing the

Hunter, or Hunting the Robber? 29 Ark. L. Rev. 570.

John Thomas Shepherd, Comment: Who Is the Arkansas Traveler?: Analyzing Arkansas’s “Journey” Exception to the Offense of Carrying a Weapon, 66 Ark. L. Rev. 463 (2013).

CASE NOTES

ANALYSIS

- Constitutionality.
- Construction.
- Purpose.
- Assisting Law Enforcement Officers, Etc.
- Evidence and Proof.
- Indictment.
- Lawful Use.
- Length of Time Carried.
- Mail Carriers.
- Occupied Vehicle.
- Own Dwelling, Property, Etc.
- Persons Upon a Journey.
- Use as a Weapon.

**Constitutionality.**

The state may, as a matter of its police power, place appropriate restriction on one’s right to bear arms. *Jones v. State*,

314 Ark. 383, 862 S.W.2d 273 (1993), cert. denied, 512 U.S. 1237, 114 S. Ct. 2743, 129 L. Ed. 2d 863 (1994).

The simultaneous possession statute, § 5-74-106, does not unconstitutionally overlap or conflict with this section. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

**Construction.**

The primary differences between this section and § 5-73-121 (now repealed) are (1) § 5-73-121 (now repealed) contains no specific element of purpose to use the knife as a weapon against another person; (2) § 5-73-121 (now repealed) carries a three-month maximum term in jail as compared to one year for violation of this section; and (3) § 5-73-121 (now repealed) includes a presumption of guilt if the

knife's blade is three-and-one-half inches in length. *Garcia v. State*, 333 Ark. 26, 969 S.W.2d 591 (1998) (decision under prior law).

### **Purpose.**

Former section prohibiting the wearing or carrying of certain weapons was intended to prevent the carrying of a pistol with a view of being armed and ready for offense or defense in case of conflict with a person or wantonly going armed. *Allison v. State*, 161 Ark. 304, 256 S.W. 42 (1923) (decision under prior law).

### **Assisting Law Enforcement Officers, Etc.**

For cases discussing the use of armed services weapons, see *McDonald v. State*, 83 Ark. 26, 102 S.W. 703 (1907); *Blacknall v. State*, 90 Ark. 570, 119 S.W. 1119 (1909); *Henderson v. State*, 91 Ark. 224, 120 S.W. 966 (1909) (preceding decisions under prior law).

Evidence that the defendant was deputized by the town marshal to assist in preventing an expected disturbance which did not occur did not bring his act of carrying a pistol within the exception, as the marshal was not engaged in guarding prisoners. *Allison v. State*, 161 Ark. 304, 256 S.W. 42 (1923) (decision under prior law).

### **Evidence and Proof.**

It was not necessary to prove that the pistol was loaded. *State v. Wardlaw*, 43 Ark. 73 (1884) (decision under prior law).

Evidence held sufficient to support conviction. *Clark v. State*, 253 Ark. 454, 486 S.W.2d 677 (1972) (decision under prior law).

Where defendant possessed a knife bearing a double-edged, nearly five-inch blade which was concealed under his shirt and in the small part of his back, the knife was described as a gang-type weapon, and defendant offered no explanation for having the knife concealed on his person, evidence of violation of this section held sufficient. *Nesdahl v. State*, 319 Ark. 277, 890 S.W.2d 596 (1995).

Arrest of driver for violation of this section, after being stopped and searched because the car had no license plates, upheld. *United States v. Peyton*, 108 F.3d 876 (8th Cir. 1997).

Evidence was sufficient to support a conviction for carrying a weapon where

the defendant, without a permit, had in her vehicle and in her possession a handgun, and she pointed the gun at another person, which was evidence that the purpose of the handgun was for use against a person. *Dillehay v. State*, 74 Ark. App. 100, 46 S.W.3d 545 (2001).

In a case in which a youth was adjudicated a juvenile delinquent upon a finding that he had committed the criminal offense of carrying a weapon, in violation of this section, he unsuccessfully argued that the state did not prove that he knew the knife was there because he was driving a borrowed car, his sending the officer to retrieve his cell phone was inconsistent with such knowledge, and merely being in the car with the knife—what he referred to as joint occupancy—was insufficient evidence to sustain his adjudication. The issue on appeal was not one of joint occupancy since the youth was alone in the vehicle; therefore, the question was whether there was sufficient evidence to find that he constructively possessed the knife, and, while trial counsel seemed to have made some argument with regard to the purpose element, such argument was conspicuously absent on appeal. *M.S. v. State*, 2010 Ark. App. 254 (2010).

In a case in which a youth was adjudicated a juvenile delinquent upon a finding that he had committed the criminal offense of carrying a weapon, in violation of this section, he unsuccessfully argued that the search of the car that yielded the weapon should have been suppressed. The intrusion into the vehicle was not a search, but an errand undertaken at the youth's request to retrieve his cell phone, and the knife, or at least the handle, was found in plain sight by a police officer. *M.S. v. State*, 2010 Ark. App. 254 (2010).

### **Indictment.**

Indictment held sufficient. *State v. Masner*, 150 Ark. 469, 234 S.W. 474 (1921) (decision under prior law).

### **Lawful Use.**

Carrying a pistol to kill hogs was not a violation of former section prohibiting the wearing or carrying of certain weapons. *Cornwell v. State*, 68 Ark. 447, 60 S.W. 28 (1900) (decision under prior law).

### **Length of Time Carried.**

The weapon need not have been carried for any particular length of time. *Hender-*



son v. State, 91 Ark. 224, 120 S.W. 966 (1909); Thompson v. City of Little Rock, 194 Ark. 78, 105 S.W.2d 537 (1937) (preceding decisions under prior law).

### **Mail Carriers.**

A mail carrier was not by reason of his occupation exempted from former section prohibiting the wearing or carrying of certain weapons. *Hathcote v. State*, 55 Ark. 181, 17 S.W. 721 (1891) (decision under prior law).

### **Occupied Vehicle.**

Having a pistol in a glove compartment of an automobile was carrying a pistol. *Stephens v. City of Ft. Smith*, 227 Ark. 609, 300 S.W.2d 14 (1957) (decision under prior law).

There was probable cause to search a car's dashboard compartment where the ammunition in the car, the currency in the vents, and the configuration of the dashboard indicated a fair probability that guns, or other contraband or evidence of a crime, would be found in the dashboard compartment; defendant was held to possess the weapon found in the dashboard compartment. *United States v. Sample*, 136 F.3d 562 (8th Cir. 1998).

### **Own Dwelling, Property, Etc.**

The exception in regard to carrying weapons upon one's own premises only protected such as have an estate or interest in the premises. *Kinthead v. State*, 45 Ark. 536 (1885) (decision under prior law).

A tenant in possession of leased premises had such an interest that would have included him in the exception; however, a lodger or renter who used premises in common with others did not have such an interest that would bring him within the exception. *Clark v. State*, 49 Ark. 174, 4 S.W. 658 (1887) (decision under prior law).

A landlord had no right to carry weapons upon premises in possession of a tenant, although the tenant was wrongfully detaining the same after the termination of his lease. *Jones v. State*, 55 Ark. 186, 17 S.W. 719 (1891) (decision under prior law).

A mere license to enter certain premises gave no right to carry weapons there. *Leemons v. State*, 56 Ark. 559, 20 S.W. 404 (1892) (decision under prior law).

Owner of fee in a highway was not entitled to carry weapons thereon. *Moss v. State*, 65 Ark. 368, 45 S.W. 987 (1898) (decision under prior law).

The word "business" in subsection (c)(1) does not include vehicular businesses, such as a taxi cab or other motor vehicles used for commercial purposes. *Boston v. State*, 330 Ark. 99, 952 S.W.2d 671 (1997).

### **Persons Upon a Journey.**

One who was going from home to a definite point distant enough to convey him beyond the circle of his neighbors, and to detain him throughout the day, and not within the routine of his daily business, was upon a journey within the meaning of the former exception. *Davis v. State*, 45 Ark. 359 (1885) (decision under prior law).

The exception to former statute prohibiting the wearing or carrying of certain weapons was designed as a protection against the perils of the highway to which strangers were exposed, and which were not supposed to exist among one's neighbors. *Hathcote v. State*, 55 Ark. 181, 17 S.W. 721 (1891) (decision under prior law).

Whether a mail carrier on his daily trip was making a journey within the meaning of the law was a question of fact for a jury. *Hathcote v. State*, 55 Ark. 181, 17 S.W. 721 (1891) (decision under prior law).

One who has been on a journey could not, after his return to his accustomed haunts, continue to carry his pistol. *Holland v. State*, 73 Ark. 425, 84 S.W. 468 (1904) (decision under prior law).

A person, upon completing a journey, could not continue to carry a pistol upon stopping an hour or so at the home of his relative. *Ackerson v. State*, 76 Ark. 301, 89 S.W. 550 (1905) (decision under prior law).

One returning home from a town some miles distant where he knew only one person was upon a journey. *Ellington v. Town of Denning*, 99 Ark. 236, 138 S.W. 453 (1911) (decision under prior law).

Whether or not the accused was on a journey was a question for the jury. *Collins v. State*, 183 Ark. 425, 36 S.W.2d 75 (1931) (decision under prior law).

Where defendant was merely going from North Little Rock to Little Rock, the defendant, who was charged with carrying a gun illegally, was not entitled to the defense of carrying a weapon when upon a journey. *Woodall v. State*, 260 Ark. 786, 543 S.W.2d 957 (1976) (decision under prior law).

Where there was no evidence in the record which indicated that by driving to a



certain city and back, defendant had traveled beyond the circle of his neighbors and general acquaintances, making it necessary to defend against the perils of the highway, the court's failure to give an instruction that being on a "journey" was a defense to the charge of carrying a prohibited weapon did not constitute reversible error. *Riggins v. State*, 17 Ark. App. 68, 703 S.W.2d 463 (1986).

#### **Use as a Weapon.**

To sustain a conviction it was essential to show that the pistol was carried as a weapon and whether it was so carried was a question for the jury. *Wylie v. State*, 131 Ark. 572, 199 S.W. 905 (1917) (decision under prior law).

Where pistol was loaded it could be presumed that it was placed in the glove compartment of automobile as a weapon. *Stephens v. City of Ft. Smith*, 227 Ark. 609, 300 S.W.2d 14 (1957) (decision under prior law).

There was a presumption of fact that the loaded pistol found by sheriff's officers under the front seat of the car driven by appellant was placed there as a weapon, and while that presumption may have been removed by proof offered by appellant, it was a question of fact for the jury to resolve the truth and determine whether the pistol was carried as a weapon. *Clark v. State*, 253 Ark. 454, 486 S.W.2d 677 (1972) (decision under prior law).

There is a presumption that a loaded pistol is placed in a car as a weapon. *McGuire v. State*, 265 Ark. 621, 580 S.W.2d 198 (1979).

**Cited:** *Duckins v. State*, 271 Ark. 658, 609 S.W.2d 674 (Ct. App. 1980); *Hutcherson v. State*, 34 Ark. App. 113, 806 S.W.2d 29 (1991); *Ark. Game & Fish Comm'n v. Murders*, 327 Ark. 426, 938 S.W.2d 854 (1997).

### **5-73-121. [Repealed.]**

**Publisher's Notes.** This section, concerning carrying a knife as a weapon, was repealed by Acts 2007, No. 83, § 1. The

section was derived from Acts 1961, No. 457, §§ 1-3; A.S.A. 1947, §§ 41-3171 — 41-3173.

### **5-73-122. Carrying a firearm in publicly owned buildings or facilities.**

(a)(1) Except as provided in § 5-73-322 and § 5-73-306(5), it is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the state, or any city or county, or any state or federal military personnel, to knowingly carry or possess a loaded firearm or other deadly weapon in any publicly owned building or facility or on the State Capitol grounds.

(2) It is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the state, or any city or county, or any state or federal military personnel, to knowingly carry or possess a firearm, whether loaded or unloaded, in the State Capitol Building or the Justice Building in Little Rock.

(3) However, this subsection does not apply to a person carrying or possessing a firearm or other deadly weapon in a publicly owned building or facility or on the State Capitol grounds:

(A) For the purpose of participating in a shooting match or target practice under the auspices of the agency responsible for the publicly owned building or facility or State Capitol grounds;

(B) If necessary to participate in a trade show, exhibit, or educational course conducted in the publicly owned building or facility or on the State Capitol grounds; or

(C)(i) If the person has a license to carry a concealed handgun under § 5-73-301 et seq. and is carrying a concealed handgun in his or her motor vehicle or has left the concealed handgun in his or her locked and unattended motor vehicle in a publicly owned and maintained parking lot.

(ii)(a) As used in this subdivision (a)(3)(C), “parking lot” means a designated area or structure or part of a structure intended for the parking of motor vehicles or a designated drop-off zone for children at school.

(b) “Parking lot” does not include a parking lot owned, maintained, or otherwise controlled by the Department of Correction or Department of Community Correction.

(4) As used in this section, “facility” means a municipally owned or maintained park, football field, baseball field, soccer field, or another similar municipally owned or maintained recreational structure or property.

(b)(1) Any person other than a law enforcement officer, officer of the court, or bailiff, acting in the line of duty, or any other person authorized by the court, who possesses a handgun in the courtroom of any court of this state is guilty of a Class D felony.

(2) Otherwise, any person violating a provision of this section is guilty of a Class A misdemeanor.

**History.** Acts 1977, No. 549, §§ 1, 2; A.S.A. 1947, §§ 41-3113, 41-3114; Acts 1991, No. 1044, § 1; 1995, No. 1223, § 1; 1997, No. 910, § 1; 2013, No. 226, § 2; 2015, No. 1078, § 2; 2015, No. 1259, § 1.

**Amendments.** The 2013 amendment added “Except as provided in § 5-73-322,” in (a)(1).

The 2015 amendment by No. 1078 substituted “this subsection does not” for “the

provisions of this subsection do not” in the introductory language of (a)(3); inserted designations (a)(3)(A) and (a)(3)(B); inserted “publicly owned” and “State Capitol” in (a)(3)(A) and (a)(3)(B); and added (a)(3)(C).

The 2015 amendment by No. 1259 inserted “and § 5-73-306(5)” in (a)(1).

## 5-73-123. [Repealed.]

**Publisher’s Notes.** This section, concerning disposition of metal knuckles or canes containing weapons, was repealed by Acts 2005, No. 1994, § 547. The section was derived from Acts 1881, No. 96,

§§ 3-7, p. 191; 1907, No. 132, § 1, p. 323; C. & M. Dig., §§ 2805-2809; Pope’s Dig., §§ 3509-3513; Acts 1953, No. 43, § 1; 1973, No. 54, § 2; A.S.A. 1947, §§ 41-3152 — 41-3156.

## 5-73-124. Tear gas — Pepper spray.

(a)(1) Except as otherwise provided in this section, any person who knowingly carries or has in his or her possession any tear gas or pepper spray in any form, or any person who knowingly carries or has in his or her possession any gun, bomb, grenade, cartridge, or other weapon designed for the discharge of tear gas or pepper spray, upon conviction is guilty of a Class A misdemeanor.

(2)(A) It is lawful for a person to possess or carry, and use, a container of tear gas or pepper spray to be used for self-defense purposes only.

(B) However, the capacity of the container shall not exceed one hundred fifty cubic centimeters (150 cc).

(b) The provisions of this section do not apply to any:

(1) Law enforcement officer while engaged in the discharge of his or her official duties; or

(2) Banking institution desiring to have possession of tear gas or pepper spray in any form for the purpose of securing funds in its custody from theft or robbery.

**History.** Acts 1949, No. 338, §§ 1-3; 1977, No. 329, §§ 1, 2; A.S.A. 1947, §§ 41-3168 — 41-3170; Acts 1993, No. 674, § 1; 1995, No. 1201, § 1; 2011, No. 1168, § 2; 2013, No. 1125, §§ 18, 19.

**Amendments.** The 2011 amendment, in (a)(1), inserted “knowingly” and substituted “upon conviction is guilty of a Class A misdemeanor” for “is guilty of a misde-

meanor”; deleted “small” preceding “container” in (a)(2)(A); deleted “cartridge or” preceding “container” in (a)(2)(B); and deleted (c).

The 2013 amendment inserted the first occurrence of “knowingly” in (a)(1); and substituted “Law enforcement” for “Peace” in (b)(1).

### **5-73-125. Interstate sale and purchase of shotguns, rifles, and ammunition.**

(a) The sale of shotguns and rifles and ammunition in this state to residents of other states is authorized under regulations issued by the United States Attorney General under the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., as in effect on January 1, 2009.

(b) A resident of this state may purchase a rifle, shotgun, or ammunition in another state as expressly authorized under the regulations issued under the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., as in effect on January 1, 2009.

**History.** Acts 1969, No. 159, §§ 1, 2; A.S.A. 1947, §§ 41-3174, 41-3175; Acts 2009, No. 487, § 1.

### **RESEARCH REFERENCES**

**ALR.** Preemption of State Regulation of Weapons and Other Laws by Federal Gun Control Act. 65 A.L.R.6th 329.

### **5-73-126. Booby traps.**

(a) It is unlawful for any person to install or maintain a booby trap upon his or her own property or any other person’s property.

(b) As used in this section, “booby trap” means a device designed to cause death or serious physical injury to a person.

(c) Any person who pleads guilty or nolo contendere or who is found guilty of violating this section is guilty of a Class D felony.



**History.** Acts 1985, No. 243, §§ 1, 2; 1985, No. 399, §§ 1, 2; A.S.A. 1947, §§ 41-1660, 41-1661.

**Cross References.** Owner's duty to keep premises safe, §§ 18-11-304, 18-11-305, 18-11-307.

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Criminal Law, 8 U. Ark. Little Rock L.J. 559.

#### **5-73-127. Possession of loaded center-fire weapons in certain areas.**

(a) It is unlawful to possess a loaded center-fire weapon, other than a shotgun and other than in a residence or business of the owner, in the following areas:

(1) Baxter County:

(A) That part bounded on the south by Highway 178, on the west and north by Bull Shoals Lake, and on the east by the Central Electric Power Corporation transmission line from Howard Creek to Highway 178;

(B) That part of Bidwell Point lying south of the east-west road which crosses Highway 101 at the Presbyterian Church;

(C) That part of Bidwell Point lying west of Bennett's Bayou and north of the east-west road which crosses Highway 101 at the Presbyterian Church;

(D) That part of Baxter County between:

(i) County Road 139 and Lake Norfolk to the north and west;

(ii) County Road 151 and Lake Norfolk to the north, west, and south in the Diamond Bay area;

(iii) The Bluff Road and Lake Norfolk to the west;

(iv) John Lewis Road (Timber Lake Manor) and Lake Norfolk to the west and south;

(v) The south end of County Road 91 south of its intersection with John Lewis Road and Lake Norfolk to the south and east; and

(vi) County Road 150 from its intersection with County Road 93 south and Lake Norfolk to the south and east but not east of County Road 93;

(2) Benton County:

(A) That part of the Hobbs Estate north of State Highway 12, west of Rambo Road, and south and east of Van Hollow Creek and the Van Hollow Creek arm of Beaver Lake;

(B) All of Bella Vista Village; and

(C) That part bounded on the north by Beaver Lake, on the east by Beaver Lake, on the south by the Hobbs State Management Area boundary from the intersection of State Highway 12 eastward along the boundary to its intersection with the Van Hollow Creek arm of Beaver Lake;

(3) Benton and Carroll Counties: That part bounded on the north by Highway 62, on the east by Highway 187 and Henry Hollow Creek, and

the south and west by Beaver Lake and the road from Beaver Dam north to Highway 62;

(4) Conway County: That part lying above the rimrock of Petit Jean Mountain;

(5) Garland County: All of Hot Springs Village and Diamondhead;

(6) Marion County:

(A) That part known as Bull Shoals Peninsula, bounded on the east and north by White River and Lake Bull Shoals, on the west by the Jimmie Creek arm of Lake Bull Shoals, and on the south by the municipal boundaries of the City of Bull Shoals;

(B) That part of Marion County bounded on the north, west, and south by Bull Shoals Lake and on the east by County Roads 355 and 322 from their intersections with State Highway 202 to the points where they respectively dead-end at arms of Bull Shoals Lake;

(C) The Yocum Bend Peninsula of Bull Shoals Lake bounded on the north and east by Bull Shoals Lake, on the west by Pine Mountain and Bull Shoals Lake, and on the south by County Road 30; and

(D) Those lands situated in Marion County known as the Frost Point Peninsula, not inundated by the waters of Bull Shoals Lake, being more particularly described as follows:

(i) Section Six, Township Twenty North, Range Fifteen West, (Sec. 6 — T.20 N. — R.15 W.), lying south of the White River channel;

(ii) Section One, Township Twenty North, Range Sixteen West, (Sec. 1 — T.20 N. — R.16 W.); and

(iii) East Half of Section Two, Township Twenty North, Range Sixteen West, (E ½ Sec. 2 — T.20 N. — R.16 W.); North Half of the Northeast Quarter of Section Eleven, Township Twenty North, Range Sixteen West (N ½ — NE ¼ Sec. 11 — T.20 N. — R.16 W.); and

(7) A platted subdivision located in an unincorporated area.

(b) Nothing contained in this section shall be construed to limit or restrict or to make unlawful the discharge of a firearm in defense of a person or property within the areas described in this section.

(c) A person who is found guilty or who pleads guilty or nolo contendere to violating this section is guilty of a violation and shall be fined no less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500).

(d) This section does not apply to a:

(1) Law enforcement officer in the performance of his or her duties;

(2) Discharge of a center-fire weapon at a firing range maintained for the discharging of a center-fire weapon; or

(3) Person possessing a valid concealed handgun license under § 5-73-301 et seq.

**History.** Acts 1985, No. 515, §§ 1-3; 1987, No. 829, § 1; 1989, No. 63, § 1; 1991, No. 148, § 1; 1991, No. 731, § 1; 1993, No. 1099, § 1; 2007, No. 52, § 1; 2009, No. 748, § 40.

**A.C.R.C. Notes.** Though the amend-

ment by Acts 1987, No. 829, to Acts 1985, No. 515, omitted subsections (b)-(d) of this section, it does not appear that the General Assembly intended to repeal those subsections by the enactment of Acts 1987, No. 829.

**5-73-128. Offenses upon property of public schools.**

(a)(1) The court shall prepare and transmit to the Department of Finance and Administration an order of denial of driving privileges for a person within twenty-four (24) hours after the plea or finding, if a person who is less than nineteen (19) years of age at the time of the commission of the offense:

(A) Pleads guilty or nolo contendere to any criminal offense under § 5-73-101 et seq. or the Uniform Machine Gun Act, § 5-73-201 et seq., and the plea is accepted by the court, or is found guilty of any criminal offense under § 5-73-101 et seq. or the Uniform Machine Gun Act, § 5-73-201 et seq., if the state proves that the offense was committed upon the property of a public school or in or upon any school bus; or

(B) Is found by a juvenile division of circuit court to have committed an offense described in subdivision (a)(1)(A) of this section.

(2) In a case of extreme and unusual hardship, the order may provide for the issuance of a restricted driving permit to allow driving to and from a place of employment or driving to and from school.

(b) Upon receipt of an order of denial of driving privileges under this section, the department shall suspend the motor vehicle operator's license of the person for not less than twelve (12) months nor more than thirty-six (36) months.

(c) A penalty prescribed in this section is in addition to any other penalty prescribed by law for an offense covered by this section.

**History.** Acts 1993, No. 264 §§ 1-3;  
1993, No. 781, §§ 1-3.

**5-73-129. Furnishing a handgun or a prohibited weapon to a felon.**

(a) A person commits the offense of furnishing a handgun to a felon if he or she sells, barter, leases, gives, rents, or otherwise furnishes a handgun to a person who he or she knows has been found guilty of or pleaded guilty or nolo contendere to a felony.

(b) A person commits the offense of furnishing a prohibited weapon to a felon if he or she sells, barter, leases, gives, rents, or otherwise furnishes:

(1) A sawed-off shotgun or rifle;

(2) A firearm that has been specially made or specially adapted for silent discharge;

(3) A machine gun;

(4) A bomb;

(5) Metal knuckles;

(6) A defaced firearm, as defined in § 5-73-107; or

(7) Other implement for the infliction of serious physical injury or death that serves no common lawful purpose,  
to a person who has been found guilty of or who has pleaded guilty or nolo contendere to a felony.



(c) Furnishing a handgun or a prohibited weapon to a felon is a Class B felony.

**History.** Acts 1994 (2nd Ex. Sess.), No. 41, § 1; 1994 (2nd Ex. Sess.), No. 42, § 1.

### RESEARCH REFERENCES

**ALR.** Validity of State Gun Control Legislation Under State Constitutional Provisions Securing Right to Bear Arms — Convicted Felons. 85 A.L.R.6th 641.

### **5-73-130. Seizure and forfeiture of firearm — Seizure and forfeiture of motor vehicle — Disposition of property seized.**

(a) If a person under eighteen (18) years of age is unlawfully in possession of a firearm, the firearm shall be seized and, after an adjudication of delinquency or a conviction, is subject to forfeiture.

(b) If a felon or a person under eighteen (18) years of age is unlawfully in possession of a firearm in a motor vehicle, the motor vehicle is subject to seizure and, after an adjudication of delinquency or a conviction, subject to forfeiture.

(c) As used in this section, “unlawfully in possession of a firearm” does not include any act of possession of a firearm that is prohibited only by:

(1) Section 5-73-127, unlawful to possess loaded center-fire weapons in certain areas; or

(2) A regulation of the Arkansas State Game and Fish Commission.

(d) The procedures for forfeiture and disposition of the seized property are as follows:

(1) The prosecuting attorney of the judicial district within whose jurisdiction the property is seized that is sought to be forfeited shall promptly proceed against the property by filing in the circuit court a petition for an order to show cause why the circuit court should not order forfeiture of the property; and

(2) The petition shall be verified and shall set forth:

(A) A statement that the action is brought pursuant to this section;

(B) The law enforcement agency bringing the action;

(C) A description of the property sought to be forfeited;

(D) A statement that on or about a date certain there was an adjudication of delinquency or a conviction and a finding that the property seized is subject to forfeiture;

(E) A statement detailing the facts in support of subdivision (d)(1) of this section; and

(F) A list of all persons known to the law enforcement agency, after diligent search and inquiry, who may claim an ownership interest in the property by title or registration or by virtue of a lien allegedly perfected in the manner prescribed by law.

(e)(1) Upon receipt of a petition complying with the requirements of subdivision (d)(1) of this section, the circuit court judge having juris-

diction shall issue an order to show cause setting forth a statement that this subchapter is the controlling law.

(2) In addition, the order shall set a date at least forty-one (41) days from the date of first publication of the order pursuant to subsection (f) of this section for all persons claiming an interest in the property to file such pleadings as they desire as to why the circuit court should not order the forfeiture of the property for use, sale, or other disposition by the law enforcement agency seeking forfeiture of the property.

(3) The circuit court shall further order that any person who does not appear on that date is deemed to have defaulted and waived any claim to the subject property.

(f)(1) The prosecuting attorney shall give notice of the forfeiture proceedings by:

(A) Causing a copy of the order to show cause to be published two (2) times each week for two (2) consecutive weeks in a newspaper having general circulation in the county where the property is located with the last publication being not less than five (5) days before the show cause hearing; and

(B) Sending a copy of the petition and order to show cause by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(i) The property is of a type for which title or registration is required by law;

(ii) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(iii) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The law enforcement agency is only obligated to make diligent search and inquiry as to the owner of the property, and if, after diligent search and inquiry, the law enforcement agency is unable to ascertain the owner, the requirement of actual notice by mail with respect to a person having a perfected security interest in the property is not applicable.

(g) At the hearing on the matter, the petitioner has the burden to establish that the property is subject to forfeiture by a preponderance of the evidence.

(h) In determining whether or not a motor vehicle should be ordered forfeited, the circuit court may take into consideration the following factors:

(1) Any prior criminal conviction or delinquency adjudication of the felon or juvenile;

(2) Whether or not the firearm was used in connection with any other criminal act;

(3) Whether or not the motor vehicle was used in connection with any other criminal act;

(4) Whether or not the juvenile or felon was the lawful owner of the motor vehicle in question;

(5) If the juvenile or felon is not the lawful owner of the motor vehicle in question, whether or not the lawful owner knew of the unlawful act being committed that gives rise to the forfeiture penalty; and

(6) Any other factor the circuit court deems relevant.

(i) The final order of forfeiture by the circuit court shall perfect in the law enforcement agency right, title, and interest in and to the property and shall relate back to the date of the seizure.

(j) Physical seizure of property is not necessary in order to allege in a petition under this section that the property is forfeitable.

(k) Upon filing the petition, the prosecuting attorney for the judicial district may also seek such protective orders as are necessary to prevent the transfer, encumbrance, or other disposal of any property named in the petition.

(l) The law enforcement agency to which the property is forfeited shall:

(1) Destroy any forfeited firearm; and

(2) Either:

(A) Sell the motor vehicle in accordance with subsection (m) of this section; or

(B) If the motor vehicle is not subject to a lien that has been preserved by the circuit court, retain the motor vehicle for official use.

(m)(1) If a law enforcement agency desires to sell a forfeited motor vehicle, the law enforcement agency shall first cause notice of the sale to be made by publication at least two (2) times a week for two (2) consecutive weeks in a newspaper having general circulation in the county and by sending a copy of the notice of the sale by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(A) The property is of a type for which title or registration is required by law;

(B) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(C) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The notice of the sale shall include the time, place, and conditions of the sale and a description of the property to be sold.

(3) The property shall then be disposed of at public auction to the highest bidder for cash without appraisal.

(n) The proceeds of any sale and any moneys forfeited shall be applied to the payment of:

(1) The balance due on any lien preserved by the circuit court in the forfeiture proceedings;

(2) The cost incurred by the seizing law enforcement agency in connection with the storage, maintenance, security, and forfeiture of the property;

(3) The costs incurred by the prosecuting attorney or attorney for the law enforcement agency, approved by the prosecuting attorney, to which the property is forfeited; and



(4) Costs incurred by the circuit court.

(o) The remaining proceeds or moneys shall be deposited into a special county fund to be titled the “Juvenile Crime Prevention Fund”, and the moneys in the fund shall be used solely for making grants to community-based nonprofit organizations that work with juvenile crime prevention and rehabilitation.

**History.** Acts 1994 (2nd Ex. Sess.), No. 2005, No. 1994, § 260; 2007, No. 827, 55, § 1; 1994 (2nd Ex. Sess.), No. 56, § 1; § 96.

**5-73-131. Possession or use of weapons by incarcerated persons.**

(a) A person commits the offense of possession or use of weapons by incarcerated persons if, without approval of custodial authority he or she uses, possesses, makes, repairs, sells, or otherwise deals in any weapon, including, but not limited to, any bomb, firearm, knife, or other implement for the infliction of serious physical injury or death and that serves no common lawful purpose, while incarcerated in the Department of Correction, the Department of Community Correction, or a county or municipal jail or detention facility.

(b) Possession or use of weapons by incarcerated persons is a Class D felony.

(c) This section is not applicable to possession of a weapon by an incarcerated person before he or she completes the standard booking and search procedures in a jail facility after arrest.

**History.** Acts 1995, No. 443, § 1; 1995, No. 453, § 1.

**CASE NOTES**

**ANALYSIS**

In General.  
Construction.  
Mental State.

**In General.**

Where a deputy found that defendant had an improvised weapon hidden in his sock while incarcerated at the county jail, the state was not required to show how defendant intended to use the weapon in order to convict him of possession of a weapon by an incarcerated person. *Owens v. State*, 92 Ark. App. 480, 215 S.W.3d 681 (2005).

**Construction.**

The phrase, “or other implement for the infliction of serious physical injury or

death and which serves no common lawful purpose,” is plainly intended to include the wide variety of objects that can be fashioned into dangerous weapons in an incarcerated setting without attempting to set them forth in an exhaustive list; a length of sharpened wire with a cloth handle is obviously a weapon that could potentially cause serious physical injury and is the sort of object intended by the catch-all phrase. *Owens v. State*, 92 Ark. App. 480, 215 S.W.3d 681 (2005).

**Mental State.**

Although there is no specified culpable mental state mentioned, this section does not create a strict liability offense; knowing possession is plainly all that is necessary to violate the statute. *Owens v. State*, 92 Ark. App. 480, 215 S.W.3d 681 (2005).

**5-73-132. Sale, rental, or transfer of firearm to person prohibited from possessing firearms.**

(a) A person shall not sell, rent, or transfer a firearm to any person who he or she knows is prohibited by state or federal law from possessing the firearm.

(b)(1) Violation of this section is a Class A misdemeanor, unless the firearm is:

- (A) A handgun;
- (B) A sawed-off or short-barrelled shotgun, as defined in § 5-1-102;
- (C) A sawed-off or short-barrelled rifle, as defined in § 5-1-102;
- (D) A firearm that has been specially made or specially adapted for silent discharge;
- (E) A machine gun;
- (F) An explosive or incendiary device, as defined in § 5-71-301;
- (G) A defaced firearm, as defined in § 5-73-107; or
- (H) Other implement for the infliction of serious physical injury or death that serves no common lawful purpose.

(2) If the firearm is listed in subdivision (b)(1) of this section, a violation of this section is a Class B felony.

**History.** Acts 1999, No. 1558, § 3.

**5-73-133. Possession of a taser stun gun.**

(a) As used in this section, “taser stun gun” means any device that:

(1) Is powered by an electrical charging unit such as a battery; and

(2) Either:

(A) Emits an electrical charge in excess of twenty thousand (20,000) volts; or

(B) Is otherwise capable of incapacitating a person by an electrical charge.

(b)(1) No person who is eighteen (18) years of age or under may purchase or possess a taser stun gun.

(2) No person shall sell, barter, lease, give, rent, or otherwise furnish a taser stun gun to a person who is eighteen (18) years of age or under.

(c) Any law enforcement officer using a taser stun gun shall be properly trained in the use of the taser stun gun and informed of any danger or risk of serious harm and injury that may be caused by the use of the taser stun gun on a person.

(d)(1) A person who violates subdivision (b)(1) of this section is deemed guilty of an unclassified misdemeanor punishable by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000).

(2) A person who violates subdivision (b)(2) of this section is deemed guilty of a Class B felony.

**History.** Acts 2005, No. 2153, § 1.

SUBCHAPTER 2 — UNIFORM MACHINE GUN ACT

SECTION.

- 5-73-201. Title.
- 5-73-202. Definitions.
- 5-73-203. Uniformity of interpretation.
- 5-73-204. Possession or use for offensive or aggressive purposes unlawful.
- 5-73-205. Presumption of offensive or aggressive purpose.
- 5-73-206. Evidence of possession or use.

SECTION.

- 5-73-207. Manufacture for military, non-aggressive, or nonoffensive use.
- 5-73-208. Registration by manufacturers.
- 5-73-209. [Repealed.]
- 5-73-210. [Repealed.]
- 5-73-211. Perpetrating or attempting crime.

**Effective Dates.** Acts 1935, No. 80, § 14: Feb. 26, 1935. Emergency clause provided: “Whereas, under the present law of the state of Arkansas the officers of the state are powerless to effectively combat crime, therefore, it being necessary for

the preservation of the public peace, health and safety, an emergency is hereby declared, and this act shall take effect and be in force from and after its passage and approval.”

RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Oliver, Rejecting the “Whipping-Boy” Approach to Tort Law: Well-Made Handguns are not Defec-

tive Products, 14 U. Ark. Little Rock L.J. 1.

5-73-201. Title.

This subchapter may be cited as the “Uniform Machine Gun Act”.

**History.** Acts 1935, No. 80, § 12; Pope’s Dig., § 3525; A.S.A. 1947, § 41-3167.

5-73-202. Definitions.

As used in this subchapter:

- (1) “Crime of violence” means any of the following crimes or an attempt to commit any of them:
  - (A) Murder;
  - (B) Manslaughter;
  - (C) Kidnapping;
  - (D) Rape;
  - (E) Mayhem;
  - (F) Assault to do great bodily harm;
  - (G) Robbery;
  - (H) Burglary;
  - (I) Housebreaking;
  - (J) Breaking and entering; and
  - (K) Larceny;



(2) “Machine gun” means a weapon of any description by whatever name known, loaded or unloaded, from which more than five (5) shots or bullets may be rapidly, or automatically, or semi-automatically, discharged from a magazine, by a single function of the firing device; and

(3) “Person” includes a firm, partnership, association, or corporation.

**History.** Acts 1935, No. 80, § 1; Pope’s Dig., § 3514; A.S.A. 1947, § 41-3157.

#### CASE NOTES

**Machine Gun.**

Expert testimony concerning the weapon and why it would not fire more than once established a fact question for

the jury concerning whether the seized weapon was a machine gun. *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984).

#### **5-73-203. Uniformity of interpretation.**

This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**History.** Acts 1935, No. 80, § 11; Pope’s Dig., § 3524; A.S.A. 1947, § 41-3166.

#### **5-73-204. Possession or use for offensive or aggressive purposes unlawful.**

Possession or use of a machine gun for offensive or aggressive purpose is declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than ten (10) years.

**History.** Acts 1935, No. 80, § 3; Pope’s Dig., § 3516; A.S.A. 1947, § 41-3159.

#### CASE NOTES

**Cited:** *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984).

#### **5-73-205. Presumption of offensive or aggressive purpose.**

(a) Possession or use of a machine gun is presumed to be for an offensive or aggressive purpose:

(1) When the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found;

(2) When in the possession of or used by an unnaturalized foreign-born person or a person who has been convicted of a crime of violence in any court of record, state or federal, of the United States of America, its territories or insular possessions;

(3) [Repealed.]

(4) When empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of use in the machine gun are found in the immediate vicinity of the machine gun.

(b) A machine gun is exempt from the presumption of offensive or aggressive purpose if:

(1) The machine gun has been registered to a corporation in the business of manufacturing ammunition or a representative of the corporation under the National Firearms Act, 26 U.S.C. § 5801 et seq., or the Gun Control Act of 1968, 18 U.S.C. § 921 et seq.;

(2) The machine gun is being used primarily to test ammunition in a nonoffensive and nonaggressive manner by the corporation or the corporation's representative that the machine gun is registered to; and

(3) The corporation or the corporation's representative is not prohibited from the possession of a firearm by any state or federal law.

**History.** Acts 1935, No. 80, § 4; Pope's Dig., § 3517; A.S.A. 1947, § 41-3160; Acts 2003, No. 1352, § 1; 2007, No. 827, § 97.

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of      ssembly, Criminal Law, Weapons, 26 U. Legislation, 2003 Arkansas General As-      Ark. Little Rock L. Rev. 370.

5-73-206. Evidence of possession or use.

The presence of a machine gun in any room, boat, or vehicle is evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the machine gun is found.

**History.** Acts 1935, No. 80, § 5; Pope's Dig., § 3518; A.S.A. 1947, § 41-3161.

5-73-207. Manufacture for military, nonaggressive, or nonoffensive use.

Nothing contained in this subchapter prohibits or interferes with:

(1) The manufacture for and sale of machine guns to the military forces or the peace officers of the United States or of any political subdivision of the United States, or the transportation required for that purpose;

(2) The possession of a machine gun for scientific purpose, or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake; or

(3) The possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber, for a purpose manifestly not aggressive or offensive.

**History.** Acts 1935, No. 80, § 6; Pope's Dig., § 3519; A.S.A. 1947, § 41-3162.

**5-73-208. Registration by manufacturers.**

(a) Every manufacturer shall keep a register of all machine guns manufactured or handled by the manufacturer.

(b) This register shall show:

(1) The model and serial number, date of manufacture, sale, loan, gift, delivery, or receipt, of every machine gun, the name, address, and occupation of the person to whom the machine gun was sold, loaned, given, or delivered, or from whom it was received; and

(2) The purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given, or delivered, or from whom received.

(c) Upon demand every manufacturer shall permit any marshal, sheriff, or police officer to inspect the manufacturer's entire stock of machine guns, parts, and supplies therefor, and shall produce the register, required by this section, for inspection.

(d) A violation of this section is a violation punishable by a fine of not less than one hundred dollars (\$100).

**History.** Acts 1935, No. 80, § 7; Pope's Dig., § 3520; A.S.A. 1947, § 41-3163; Acts 2009, No. 748, § 41.

**5-73-209. [Repealed.]**

**Publisher's Notes.** This section, concerning the registration of machine guns by users and owners, was repealed by Acts 2001, No. 1181, § 1. The section was de-

rived from Acts 1935, No. 80, § 8; Pope's Dig., § 3521; A.S.A. 1947, § 41-3164; Acts 1989, No. 373, § 1.

**5-73-210. [Repealed.]**

**Publisher's Notes.** This section, concerning search warrants, was repealed by Acts 2013, No. 1348, § 18. The section

was derived from Acts 1935, No. 80, § 9; Pope's Dig., § 3522; A.S.A. 1947, § 41-3165; Acts 2005, No. 1994, § 247.

**5-73-211. Perpetrating or attempting crime.**

Possession or use of a machine gun in the course of a criminal offense is a Class A felony.

**History.** Acts 1935, No. 80, § 2; Pope's Dig., § 3515; A.S.A. 1947, § 41-3158; Acts 2005, No. 1994, § 414.

**SUBCHAPTER 3 — CONCEALED HANDGUNS****SECTION.**

5-73-301. Definitions.

5-73-302. Authority to issue license.

5-73-303. Immunity from civil damages.

5-73-304. Exemptions.

5-73-305. Criminal penalty.

**SECTION.**

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5-73-307. List of license holders.

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5-73-309. License — Requirements.

5-73-310. Application form.



## SECTION.

- 5-73-311. Application procedure.
- 5-73-312. Revocation.
- 5-73-313. Expiration and renewal.
- 5-73-314. Lost, destroyed, or duplicate license — Change of address.
- 5-73-315. Authority to carry concealed handgun — Identification of licensee.
- 5-73-316. Fees.
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- 5-73-318. Instructor review of applications.

## SECTION.

- 5-73-319. Transfer of a license to Arkansas.
- 5-73-320. License for certain members of the Arkansas National Guard or a reserve component or active duty military personnel.
- 5-73-321. Recognition of other states' licenses.
- 5-73-322. Concealed handguns in a university, college, or community college building.
- 5-73-323. Parole board exemptions.

**Publisher's Notes.** Acts 1999, No. 786, § 2, provided: "(a) A license to carry a concealed handgun under Arkansas Code 5-73-308, issued prior to the effective date of this act, shall not be restricted to the handguns for which the person was licensed. If one (1) or more of the handguns for which the person was licensed is a semiautomatic handgun then the person may carry any handgun he or she chooses. If a semiautomatic handgun was not included then the person may carry any handgun other than a semiautomatic handgun."

"(b) As used in this section, 'handgun' has the same meaning as provided in Arkansas Code 5-73-301."

**Effective Dates.** Acts 1999, No. 51, § 5: Feb. 11, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the Brady Handgun Violence Prevention Act will allow concealed handgun licensees in qualifying states to avoid the instant background checks required by federal law; that these background checks place an unnecessary and costly burden on responsible citizens to wait for the completion of the background check and to pay the cost of the system; and that by modifying the Arkansas law it will eliminate a costly and duplicative background check for these responsible citizens when purchasing firearms in Arkansas. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become

effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1508, § 19: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act makes various technical corrections in the Arkansas Code; that this act further clarifies the law to provide that the Arkansas Code Revision Commission may correct errors resulting from enactments of prior sessions; and that this act should go into effect immediately in order to be applicable during the codification process of the enactments of this regular session. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2009, No. 294, § 30: Mar. 3, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that on-premises consumption outlets in the State of Arkansas are not able to compete on an equal and similar basis with outlets located in states surrounding the State of Arkansas; that the State of Arkansas is in need of

additional revenues; that only minor adjustments to the violation fine schedule have been made since its passage in 1981; and that this act is immediately necessary to raise additional revenues and to better address violations committed by Alcoholic Beverage Control Division permit holders. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2013, No. 67, § 2: Feb. 11, 2013. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that personal security is increasingly important; that the Second Amendment of the Constitution of the United States ensures a person’s right to bear arms; and that this act is immediately necessary because a person should be allowed to carry a firearm in a church that permits the carrying of a firearm for personal security. Therefore, an emergency is declared to exist, and this act being immediately necessary for the

preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2013, No. 1271, § 3: Apr. 16, 2013. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that a concealed handgun can be used to protect oneself from harm; that certain persons are more susceptible to harm from other persons; and that this act is immediately necessary because a reduced fee for a concealed carry license will make it easier for certain persons to protect themselves. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

## RESEARCH REFERENCES

**Ark. L. Notes.** Laurent Sacharoff & Jacob Worlow, Open Carry in Arkansas –

An Ambiguous Statute, 2014 Ark. L. Notes 1548.

## 5-73-301. Definitions.

As used in this subchapter:

(1) “Acceptable electronic format” means an electronic image produced on the person’s own cellular phone or other type of portable electronic device that displays all of the information on a concealed handgun license as clearly as an original concealed handgun license;

(2) “Concealed” means to cover from observation so as to prevent public view;

(3) “Convicted” means that a person pleaded guilty or nolo contendere to or was found guilty of a criminal offense;

(4) “Handgun” means any firearm, other than a fully automatic firearm, with a barrel length of less than twelve inches (12”) that is designed, made, or adapted to be fired with one (1) hand;

(5) “Licensee” means a person granted a valid license to carry a concealed handgun pursuant to this subchapter; and

(6) “Parking lot” means an area, structure, or part of a structure designated for the parking of motor vehicles or a designated drop-off zone for children at a school.

**History.** Acts 1995, No. 411, § 1; 1995, No. 419, § 1; 1997, No. 1239, § 1; 2007, No. 664, § 1; 2007, No. 827, §§ 98, 99; 2013, No. 419, § 1; 2015, No. 1078, § 3.

**Amendments.** The 2013 amendment added present (1).  
The 2015 amendment added (6).

### RESEARCH REFERENCES

**ALR.** Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons. 33 A.L.R.6th 407.

### 5-73-302. Authority to issue license.

(a) The Director of the Department of Arkansas State Police may issue a license to carry a concealed handgun to a person qualified as provided in this subchapter.

(b)(1) For new licenses issued after July 31, 2007, the license to carry a concealed handgun is valid throughout the state for a period of five (5) years from the date of issuance.

(2) After July 31, 2007, upon renewal, an existing valid license to carry a concealed handgun shall be issued for a period of five (5) years.

(c)(1)(A) After July 31, 2007, a license or renewal of a license issued to a former elected or appointed sheriff of any county of this state shall be issued for a period of five (5) years.

(B) The license issued to a former elected or appointed sheriff is revocable on the same grounds as other licenses.

(2)(A) The former elected or appointed sheriff shall meet the same qualifications as all other applicants.

(B) However, the former elected or appointed sheriff is exempt from the fee prescribed by § 5-73-311(a)(2) and from the training requirements of § 5-73-309(13) for issuance.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 389, § 1; 2007, No. 1014, §§ 1, 3.

### RESEARCH REFERENCES

**ALR.** Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons. 33 A.L.R.6th 407.



**5-73-303. Immunity from civil damages.**

The state, a county or city, or any employee of the state, county, or city is not liable for any civil damages resulting from the issuance of a license pursuant to a provision of this subchapter.

**History.** Acts 1995, No. 411, § 3; 1995, No. 419, § 3.

**5-73-304. Exemptions.**

(a)(1)(A) A current or former certified law enforcement officer, chief of police, court bailiff, or county sheriff is exempt from the licensing requirements of this subchapter if otherwise authorized to carry a concealed handgun.

(B) A former certified law enforcement officer whose employment was terminated by a law enforcement agency due to disciplinary reasons or because he or she committed a disqualifying criminal offense is not exempt from the licensing requirements of this subchapter.

(2) Solely for purposes of this subchapter, an auxiliary law enforcement officer certified by the Arkansas Commission on Law Enforcement Standards and Training and approved by the county sheriff of the county where he or she is acting as an auxiliary law enforcement officer is deemed to be a certified law enforcement officer.

(b) An auxiliary law enforcement officer or employee of a local detention facility is exempt from the licensing requirements of this subchapter if the auxiliary law enforcement officer or employee of a local detention facility:

(1) If an auxiliary law enforcement officer, has completed the minimum training requirements and is certified as an auxiliary law enforcement officer in accordance with the commission; and

(2) Is authorized in writing as exempt from the licensing requirements of this subchapter by the chief of police or county sheriff that has appointed the auxiliary law enforcement officer or employs the employee of a local detention facility.

(c) The authorization prescribed in subdivision (b)(2) of this section shall be carried on the person of the auxiliary law enforcement officer or employee of a local detention facility and be produced upon demand at the request of any law enforcement officer or owner or operator of any of the prohibited places as set out in § 5-73-306.

(d) As used in this section, “employee of a local detention facility” means a person who:

(1) Is employed by a county sheriff or municipality that operates a local detention facility and whose job duties include:

(A) Securing a local detention facility;

(B) Monitoring inmates in a local detention facility; and

(C) Administering the daily operation of the local detention facility; and

(2) Has completed the minimum training requirements for his or her position.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 696, § 1; 1997, No. 1239, § 8; 1999, No. 1508, §§ 1, 7; 2013, No. 415, § 1; 2013, No. 1220, § 1.

**Amendments.** The 2013 amendment by No. 415 rewrote (a) and (b).

The 2013 amendment by No. 1220 inserted “or employee of a local detention

facility” twice in (b); added “If an auxiliary law enforcement officer” to the beginning of (b)(1); rewrote (b)(2); inserted “or employee of a local detention facility” in (c); and added (d).

### 5-73-305. Criminal penalty.

Any person who knowingly submits a false answer to any question on an application for a license issued pursuant to this subchapter, or who knowingly submits a false document when applying for a license issued pursuant to this subchapter upon conviction is guilty of a Class B misdemeanor.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2.

### RESEARCH REFERENCES

**ALR.** Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons. 33 A.L.R.6th 407.

### 5-73-306. Prohibited places.

No license to carry a concealed handgun issued pursuant to this subchapter authorizes any person to carry a concealed handgun into:

(1) Any police station, sheriff's station, or Department of Arkansas State Police station;

(2) Any Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department facility;

(3)(A) Any building of the Arkansas State Highway and Transportation Department or onto grounds adjacent to any building of the Arkansas State Highway and Transportation Department.

(B) However, subdivision (3)(A) of this section does not apply to:

(i) A rest area or weigh station of the Arkansas State Highway and Transportation Department; or

(ii) A publicly owned and maintained parking lot that is a publicly accessible parking lot if the licensee is carrying a concealed handgun in his or her motor vehicle or has left the concealed handgun in his or her locked and unattended motor vehicle in the publicly owned and maintained parking lot;

(4) Any part of a detention facility, prison, or jail, including without limitation a parking lot owned, maintained, or otherwise controlled by the Department of Correction or Department of Community Correction;

(5) Any courthouse, courthouse annex, or other building owned, leased, or regularly used by a county for conducting court proceedings or housing a county office unless:

(A) The licensee is either:

(i) Employed by the county; or

(ii) A countywide elected official;

(B) The licensee's principal place of employment is within the courthouse, the courthouse annex, or other building owned, leased, or regularly used by the county for conducting court proceedings or housing a county office; and

(C) The quorum court by ordinance approves a plan that allows licensees permitted under this subdivision (5) to carry a concealed handgun into the courthouse as set out by the local security and emergency preparedness plan;

(6)(A) Any courtroom.

(B) However, nothing in this subchapter precludes a judge from carrying a concealed weapon or determining who will carry a concealed weapon into his or her courtroom;

(7) Any meeting place of the governing body of any governmental entity;

(8) Any meeting of the General Assembly or a committee of the General Assembly;

(9) Any state office;

(10) Any athletic event not related to firearms;

(11) Any portion of an establishment, except a restaurant as defined in § 3-5-1202, licensed to dispense alcoholic beverages for consumption on the premises;

(12) Any portion of an establishment, except a restaurant as defined in § 3-5-1202, where beer or light wine is consumed on the premises;

(13)(A) A school, college, community college, or university campus building or event.

(B) However, subdivision (13)(A) of this section does not apply to:

(i) A kindergarten through grade twelve (K-12) private school operated by a church or other place of worship that:

(a) Is located on the developed property of the kindergarten through grade twelve (K-12) private school;

(b) Allows the licensee to carry a concealed handgun into the church or other place of worship under this section; and

(c) Allows the licensee to possess a concealed handgun on the developed property of the kindergarten through grade twelve (K-12) private school under § 5-73-119(e);

(ii) A kindergarten through grade twelve (K-12) private school or a prekindergarten private school that through its governing board or director has set forth the rules and circumstances under which the licensee may carry a concealed handgun into a building or event of the kindergarten through grade twelve (K-12) private school or the prekindergarten private school;

(iii) Participation in an authorized firearms-related activity;



(iv) Carrying a concealed handgun as authorized under § 5-73-322; or

(v) A publicly owned and maintained parking lot of a college, community college, or university if the licensee is carrying a concealed handgun in his or her motor vehicle or has left the concealed handgun in his or her locked and unattended motor vehicle;

(14) Inside the passenger terminal of any airport, except that no person is prohibited from carrying any legal firearm into the passenger terminal if the firearm is encased for shipment for purposes of checking the firearm as baggage to be lawfully transported on any aircraft;

(15)(A) Any church or other place of worship.

(B) However, this subchapter does not preclude a church or other place of worship from determining who may carry a concealed handgun into the church or other place of worship;

(16) Any place where the carrying of a firearm is prohibited by federal law;

(17) Any place where a parade or demonstration requiring a permit is being held, and the licensee is a participant in the parade or demonstration; or

(18)(A)(i) Any place at the discretion of the person or entity exercising control over the physical location of the place by placing at each entrance to the place a written notice clearly readable at a distance of not less than ten feet (10') that "carrying a handgun is prohibited".

(ii)(a) If the place does not have a roadway entrance, there shall be a written notice placed anywhere upon the premises of the place.

(b) In addition to the requirement of subdivision (18)(A)(ii)(a) of this section, there shall be at least one (1) written notice posted within every three (3) acres of a place with no roadway entrance.

(iii) A written notice as described in subdivision (18)(A)(i) of this section is not required for a private home.

(iv) Any licensee entering a private home shall notify the occupant that the licensee is carrying a concealed handgun.

(B) Subdivision (18)(A) of this section does not apply if the physical location is:

(i) A public university, public college, or community college, as defined in § 5-73-322, and the licensee is carrying a concealed handgun as provided under § 5-73-322; or

(ii) A publicly owned and maintained parking lot if the licensee is carrying a concealed handgun in his or her motor vehicle or has left the concealed handgun in his or her locked and unattended motor vehicle.

**History.** Acts 1995, No. 411, § 2; 1995, No. 67, § 1; 2013, No. 226, §§ 3, 4; 2013, No. 419, § 2; 1997, No. 1239, § 2; 2003, No. 1390, § 2; 2015, No. 933, § 2; 2015, No. 1110, § 1; 2007, No. 664, § 2; 2009, No. 1078, §§ 4-7; 2015, No. 1175, § 1; No. 294, § 28; 2011, No. 758, § 1; 2013, 2015, No. 1259, § 2.

**Amendments.** The 2011 amendment substituted “§ 3-5-1202” for “§ 3-9-202” in present (11) and (12).

The 2013 amendment by No. 67 redesignated former (16) as (16)(A), and added (16)(B) (now subdivision (15)).

The 2013 amendment by No. 226 redesignated former (19)(A) as (19)(A)(i); redesignated former (19)(B) through (19)(D) as (19)(A)(ii) through (19)(A)(iv); and added (19)(B) (now subdivision (18)).

The 2013 amendment by No. 1390 redesignated former (14) as (14)(A); and inserted (14)(B) and redesignated the remaining subdivisions accordingly (now subdivision (13)).

The 2015 amendment by No. 933 inserted designation (14)(B)(i) and redesignated former (14)(B)(i)-(iii) as (14)(B)(i)(a)-(c); and added (14)(B)(ii) (now subdivision (13)).

The 2015 amendment by No. 1078 inserted designation (3)(B)(i); added “or” at the end of (3)(B)(i); added (3)(B)(ii); rewrote (4); deleted “unless for the purpose of participating in an authorized firearms-related activity or otherwise provided for in § 5-73-322” at the end of (14)(A) (now (13)(A)); inserted designation (14)(B)(i) and redesignated former (14)(B)(i)-(iii) as (14)(B)(i)(a)-(c) (now (13)(B)(i) and (13)(B)(i)(a)-(c)); added (14)(B)(ii) through (14)(B)(iv) (now (13)(B)(iii) through (13)(B)(v)); inserted designation (19)(B)(i) (now (18)(B)(i)); added “or” at the end of (19)(B)(i) (now (18)(B)(i)); and added (19)(B)(ii) (now (18)(B)(ii)).

The 2015 amendment by No. 1175 repealed former (7) and redesignated the remaining sections accordingly.

The 2015 amendment by No. 1259 rewrote (5).

## RESEARCH REFERENCES

**Ark. L. Rev.** Thomas Christoph Keller, Comment: ABC’s and AR-15’s: Arming Arkansas’s Teachers, 67 Ark. L. Rev. 687 (2014).

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Weapons, 26 U. Ark. Little Rock L. Rev. 370.

### 5-73-307. List of license holders.

(a) The Department of Arkansas State Police shall maintain an automated listing of license holders, and this information shall be available online, upon request, at any time, to any law enforcement agency through the Arkansas Crime Information Center.

(b) Nothing in this subchapter shall be construed to require or allow the registration, documentation, or providing of a serial number with regard to any firearm.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 3; 2007, No. 827, § 100.

### 5-73-308. License — Issuance or denial.

(a)(1)(A) The Director of the Department of Arkansas State Police may deny a license if within the preceding five (5) years the applicant has been found guilty of one (1) or more crimes of violence constituting a misdemeanor or for the offense of carrying a weapon.

(B) The director may revoke a license if the licensee has been found guilty of one (1) or more crimes of violence within the preceding three (3) years.

(2) Subdivision (a)(1) of this section does not apply to a misdemeanor that has been expunged or for which the imposition of sentence was suspended.

(3) Upon notification by any law enforcement agency or a court and subsequent written verification, the director shall suspend a license or the processing of an application for a license if the licensee or applicant is arrested or formally charged with a crime that would disqualify the licensee or applicant from having a license under this subchapter until final disposition of the case.

(b)(1) The director may deny a license to carry a concealed handgun if the county sheriff or chief of police, if applicable, of the applicant's place of residence or the director or the director's designee submits an affidavit that the applicant has been or is reasonably likely to be a danger to himself or herself or others or to the community at large, as demonstrated by past patterns of behavior or participation in an incident involving unlawful violence or threats of unlawful violence, or if the applicant is under a criminal investigation at the time of applying for a license to carry a concealed handgun.

(2) Within one hundred twenty (120) days after the date of receipt of the items listed in § 5-73-311(a), the director shall:

(A) Issue the license; or

(B) Deny the application based solely on the ground that the applicant fails to qualify under the criteria listed in this subchapter.

(3)(A) If the director denies the application, the director shall notify the applicant in writing, stating the grounds for denial.

(B) The decision of the director is subject to appeal under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 4; 2011, No. 758, § 2; 2013, No. 1328, § 1.

**Amendments.** The 2011 amendment, in (b)(1), inserted "to carry a concealed handgun" twice, inserted "county" preceding "sheriff", and deleted "as the result of the applicant's mental or psychological state" following "at large".

The 2013 amendment inserted "or the director or the director's designee" in (b)(1); and substituted "subject to appeal under the Arkansas Administrative Procedure Act, § 25-15-201 et seq." for "final" in (b)(3)(B).

### 5-73-309. License — Requirements.

The Director of the Department of Arkansas State Police shall issue a license to carry a concealed handgun if the applicant:

(1) Is a citizen of the United States or a permanent legal resident;

(2)(A) Is a resident of the state and has been a resident continuously for ninety (90) days or longer immediately preceding the filing of the application.

(B) However, subdivision (2)(A) of this section does not apply to any:

(i) Active duty member of the United States Armed Forces who submits documentation of his or her active duty status; or



- (ii) Spouse of an active duty member of the United States Armed Forces who submits documentation of his or her spouse's active duty status;
- (3) Is at least:
  - (A) Twenty-one (21) years of age; or
  - (B) Eighteen (18) years of age and is:
    - (i) Currently a federally recognized commissioned or noncommissioned officer or an enlisted member on active duty in the United States Armed Forces;
    - (ii) In the National Guard or a reserve component of the United States Armed Forces; or
    - (iii) A former member of the United States Armed Forces who has been honorably discharged;
- (4) Does not suffer from a mental or physical infirmity that prevents the safe handling of a handgun and has not threatened or attempted suicide;
- (5)(A) Has not been convicted of a felony in a court of this state, of any other state, or of the United States without having been pardoned for conviction and had firearms possession rights restored.
- (B) A record of a conviction that has been sealed or expunged under Arkansas law does not render an applicant ineligible to receive a concealed handgun license if:
  - (i) The applicant was sentenced prior to March 13, 1995; or
  - (ii) The order sealing or expunging the applicant's record of conviction complies with § 16-90-605 [repealed];
- (6) Is not subject to any federal, state, or local law that makes it unlawful to receive, possess, or transport any firearm, and has had his or her background check successfully completed through the Department of Arkansas State Police and the Federal Bureau of Investigation's National Instant Criminal Background Check System;
- (7)(A) Does not chronically or habitually abuse a controlled substance to the extent that his or her normal faculties are impaired.
- (B) It is presumed that an applicant chronically and habitually uses a controlled substance to the extent that his or her faculties are impaired if the applicant has been voluntarily or involuntarily committed to a treatment facility for the abuse of a controlled substance or has been found guilty of a crime under the provisions of the Uniform Controlled Substances Act, § 5-64-101 et seq., or a similar law of any other state or the United States relating to a controlled substance within the three-year period immediately preceding the date on which the application is submitted;
- (8)(A) Does not chronically or habitually use an alcoholic beverage to the extent that his or her normal faculties are impaired.
- (B) It is presumed that an applicant chronically and habitually uses an alcoholic beverage to the extent that his or her normal faculties are impaired if the applicant has been voluntarily or involuntarily committed as an alcoholic to a treatment facility or has been convicted of two (2) or more offenses related to the use of alcohol

under a law of this state or similar law of any other state or the United States within the three-year period immediately preceding the date on which the application is submitted;

(9) Desires a legal means to carry a concealed handgun to defend himself or herself;

(10) Has not been adjudicated mentally incompetent;

(11) Has not been voluntarily or involuntarily committed to a mental institution or mental health treatment facility;

(12) Is not a fugitive from justice or does not have an active warrant for his or her arrest;

(13) Has satisfactorily completed a training course as prescribed and approved by the director; and

(14) Signs a statement of allegiance to the United States Constitution and the Arkansas Constitution.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 368, § 1; 1997, No. 1239, § 10; 1999, No. 51, § 1; 2003, No. 545, §§ 1, 5; 2007, No. 198, § 1; 2007, No. 664, § 3; 2013, No. 989, § 1; 2015, No. 105, § 1; 2015, No. 649, § 1.

**A.C.R.C. Notes.** Acts 2013, No. 1460, § 6, repealed § 16-90-605 referenced in subdivision (5)(B)(ii) of this section. For current law, see the Comprehensive Criminal Record Sealing Act of 2013, § 16-90-1401 et seq.

**Amendments.** The 2013 amendment substituted “member of the United States armed forces” for “military personnel” in (2)(B)(ii) and added (2)(B)(iii).

The 2015 amendment by No. 105 substituted “at least” for “twenty-one (21) years of age or older” in (3); and added (3)(A) and (B).

The 2015 amendment by No. 649 added “or a permanent legal resident” in (1); and deleted former (2)(B)(i) and redesignated the remaining subdivisions accordingly.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Weapons, 26 U. Ark. Little Rock L. Rev. 370.

### 5-73-310. Application form.

The application for a license to carry a concealed handgun shall be completed, under oath, on a form promulgated by the Director of the Department of Arkansas State Police and shall include only:

(1) The name, address, place and date of birth, race, and sex of the applicant;

(2) The driver’s license number or Social Security number of the applicant;

(3) Any previous address of the applicant for the two (2) years preceding the date of the application;

(4) A statement that the applicant is in compliance with criteria contained within §§ 5-73-308(a) and 5-73-309;

(5) A statement that the applicant has been furnished a copy of this subchapter and is acquainted with the truth and understanding of this subchapter;

(6) A conspicuous warning that the application is executed under oath, and that a knowingly false answer to any question or the knowing

submission of any false document by the applicant subjects the applicant to:

- (A) Criminal prosecution and precludes any future license's being issued to the applicant; and
- (B) Immediate revocation if the license has already been issued;
- (7) A statement that the applicant desires a legal means to carry a concealed handgun to defend himself or herself;
- (8)(A) A statement of whether the applicant is applying for:
  - (i) An unrestricted license, that allows the person to carry any handgun; or
  - (ii) A restricted license, that allows the person to carry any handgun other than a semiautomatic handgun.
- (B)(i) An applicant requesting an unrestricted license shall establish proficiency in the use of a semiautomatic handgun.
- (ii) An applicant requesting a restricted license shall establish proficiency in the use of a handgun and may use any kind of handgun when establishing proficiency; and
- (9) A statement of whether or not the applicant has been found guilty of a crime of violence or domestic abuse.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 5; 1999, No. 786, § 1.

### **5-73-311. Application procedure.**

(a) The applicant for a license to carry a concealed handgun shall submit the following to the Department of Arkansas State Police:

- (1) A completed application, as described in § 5-73-310;
- (2) A nonrefundable license fee of one hundred dollars (\$100), except that the nonrefundable license fee is fifty dollars (\$50.00) if the applicant is sixty-five (65) years of age or older;
- (3)(A) A full set of fingerprints of the applicant.
- (B) In the event a legible set of fingerprints, as determined by the department and the Federal Bureau of Investigation, cannot be obtained after a minimum of two (2) attempts, the Director of the Department of Arkansas State Police shall determine eligibility in accordance with criteria that the department shall establish by promulgating rules.
- (C) Costs for processing the set of fingerprints as required in subdivision (a)(3)(A) of this section shall be borne by the applicant;
- (4)(A) A waiver authorizing the department access to any medical, criminal, or other records concerning the applicant and permitting access to all of the applicant's criminal records.

(B) If a check of the applicant's criminal records uncovers any unresolved felony arrests over ten (10) years old, then the applicant shall obtain a letter of reference from the county sheriff, prosecuting attorney, or circuit judge of the county where the applicant resides that states that to the best of the county sheriff's, prosecuting



attorney's, or circuit judge's knowledge that the applicant is of good character and free of any felony convictions.

(C) The department shall maintain the confidentiality of the medical, criminal, or other records; and

(5) A digital photograph of the applicant or a release authorization to obtain a digital photograph of the applicant from another source.

(b)(1) Upon receipt of the items listed in subsection (a) of this section, the department shall forward the full set of fingerprints of the applicant to the appropriate agencies for state and federal processing.

(2)(A) The department shall forward a notice of the applicant's application to the sheriff of the applicant's county of residence and, if applicable, the police chief of the applicant's municipality of residence.

(B)(i) The sheriff of the applicant's county of residence and, if applicable, the police chief of the applicant's municipality of residence may participate, at his or her discretion, in the process by submitting a voluntary report to the department containing any readily discoverable information that he or she feels may be pertinent to the licensing of any applicant.

(ii) The reporting under subdivision (b)(2)(B)(i) of this section shall be made within thirty (30) days after the date the notice of the application was sent by the department.

(c) A concealed handgun license issued, renewed, or obtained under § 5-73-314 or § 5-73-319 after December 31, 2007, shall bear a digital photograph of the licensee.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 9; 1997, No. 1251, § 1; 1999, No. 487, § 1; 2007, No. 664, § 4; 2009, No. 748, § 42; 2013, No. 1271, § 1.

**Amendments.** The 2013 amendment added "except that the nonrefundable license fee is fifty dollars (\$50.00) if the applicant is sixty-five (65) years of age or older" in (a)(2).

## 5-73-312. Revocation.

(a)(1) A license to carry a concealed handgun issued under this subchapter shall be revoked if the licensee becomes ineligible under the criteria set forth in § 5-73-308(a) or § 5-73-309.

(2)(A) Any law enforcement officer making an arrest of a licensee for a violation of this subchapter or any other statutory violation that requires revocation of a license to carry a concealed handgun shall confiscate the license and forward it to the Director of the Department of Arkansas State Police.

(B) The license shall be held until a determination of the charge is finalized, with the appropriate disposition of the license after the determination.

(b) When the Department of Arkansas State Police receives notification from any law enforcement agency or court that a licensee has been found guilty or has pleaded guilty or nolo contendere to any crime involving the use of a weapon, the license issued under this subchapter is immediately revoked.

(c) The director shall revoke the license of any licensee who has pleaded guilty or nolo contendere to or been found guilty of an alcohol-related offense committed while carrying a handgun.

**History.** Acts 1995, No. 411, §§ 2, 4, 5; § 11; 2003, No. 545, § 4; 2007, No. 827, 1995, No. 419, §§ 2, 4, 5; 1997, No. 1239, § 101.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of assembly, Criminal Law, Weapons, 26 U. Legislation, 2003 Arkansas General As- Ark. Little Rock L. Rev. 370.

### 5-73-313. Expiration and renewal.

(a) Except as provided in subdivision (f)(1) of this section, the licensee may renew his or her license no more than ninety (90) days prior to the expiration date by submitting to the Department of Arkansas State Police:

- (1) A renewal form prescribed by the department;
- (2) A verified statement that the licensee remains qualified pursuant to the criteria specified in §§ 5-73-308(a) and 5-73-309;
- (3) A renewal fee of thirty-five dollars (\$35.00);
- (4) A certification or training form properly completed by the licensee's training instructor reflecting that the licensee's training was conducted; and
- (5) A digital photograph of the licensee or a release authorization to obtain a digital photograph of the licensee from another source.

(b) The license shall be renewed upon receipt of the completed renewal application, a digital photograph of the licensee, and appropriate payment of fees subject to a background investigation conducted pursuant to this subchapter that did not reveal any disqualifying offense or unresolved arrest that would disqualify a licensee under this subchapter.

(c) Additionally, a licensee who fails to file a renewal application on or before the expiration date shall renew his or her license by paying a late fee of fifteen dollars (\$15.00).

(d)(1) No license shall be renewed six (6) months or more after its expiration date, and the license is deemed to be permanently expired.

(2)(A) A person whose license has been permanently expired may reapply for licensure.

(B) An application for licensure and fees pursuant to §§ 5-73-308(a), 5-73-309, and 5-73-311(a) shall be submitted, and a new background investigation shall be conducted.

(e) A new criminal background investigation shall be conducted when an applicant applies for renewal of a license. Costs for processing a new background check shall be paid by the applicant.

(f)(1) An active duty member of the United States Armed Forces, a member of the National Guard, or a member of a reserve component of the United States Armed Forces, who is on active duty outside this state

may renew his or her license within thirty (30) days after the person returns to this state by submitting to the department:

(A) Proof of assignment outside of this state on the expiration date of the license; and

(B) The items listed in subdivisions (a)(1)-(5) of this section.

(2) Subsections (c) and (d) of this section shall not apply to a person who renews his or her license under subdivision (f)(1) of this section.

**History.** Acts 1995, No. 411, § 2; 1995, 1999, No. 487, § 2; 2003, No. 545, § 2; No. 419, § 2; 1997, No. 1239, §§ 6, 12; 2005, No. 881, § 1; 2007, No. 664, § 5.

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Assembly, Criminal Law, Weapons, 26 U. Legislation, 2003 Arkansas General As- Ark. Little Rock L. Rev. 370.

### 5-73-314. Lost, destroyed, or duplicate license — Change of address.

(a) Within thirty (30) days after the changing of a permanent address, or within thirty (30) days after having a license to carry a concealed handgun lost, the licensee shall notify the Director of the Department of Arkansas State Police in writing of the change or loss.

(b) If a license to carry a concealed handgun is lost or destroyed, or a duplicate is requested, the person to whom the license to carry a concealed handgun was issued shall comply with the provisions of subsection (a) of this section and may obtain a duplicate license or replacement license upon:

(1) Paying the Department of Arkansas State Police a fee established by the director under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.; and

(2) Furnishing a notarized statement to the department that the license to carry a concealed handgun has been lost or destroyed or that a duplicate is requested.

(c) The fee described in subdivision (b)(1) of this section shall be reduced by fifty percent (50%) if a person sixty-five (65) years of age or older is requesting a replacement or duplicate license under this section.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 2011, No. 758, § 3; 2013, No. 1271, § 2; 2015, No. 1155, § 15.

**Amendments.** The 2011 amendment, in (a), substituted “having a license to carry a concealed handgun lost” for “having a license or handgun lost or disposed of” and deleted “or disposition” at the end; in the introductory paragraph of (b), deleted “concealed handgun” following “If a” and inserted “to carry a concealed handgun” twice; and, in (b)(2), deleted “hand-

gun or” preceding “license” and “or disposed of” at the end.

The 2013 amendment inserted “or duplicate” following “destroyed” in the section heading; inserted “or a duplicate is requested” in (b); substituted “Paying” for “Payment to” in (b)(1); added “or that a duplicate is requested” in (b)(2); and added (c).

The 2105 amendment inserted “destroyed or” in (b)(2); and substituted “sixty-five (65) years of age or older” for



“described in § 5-73-311 (a)(2)” in (c).

### **5-73-315. Authority to carry concealed handgun — Identification of licensee.**

(a) Any licensee possessing a valid license issued pursuant to this subchapter may carry a concealed handgun.

(b) The licensee shall:

(1) Carry the license, or an electronic copy of the license in an acceptable electronic format, together with valid identification, at any time when the licensee is carrying a concealed handgun; and

(2) Display both the license, or an electronic copy of the license in an acceptable electronic format, and proper identification upon demand by a law enforcement officer.

(c) The presentment of proof of a license to carry a concealed handgun in electronic form does not:

(1) Authorize a search of any other content of an electronic device without a search warrant or probable cause; or

(2) Expand or restrict the authority of a law enforcement officer to conduct a search or investigation.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 2007, No. 827, § 102; 2013, No. 419, § 2. added “or an electronic copy of the license in an acceptable electronic format” in (b)(1) and (b)(2); and added (c).

**Amendments.** The 2013 amendment

### **5-73-316. Fees.**

Any fee collected by the Department of Arkansas State Police pursuant to this subchapter shall be deposited into the Department of Arkansas State Police Fund.

**History.** Acts 1995, No. 411, § 2; 1995, No. 419, § 2.

### **5-73-317. Rules and regulations.**

The Director of the Department of Arkansas State Police may promulgate rules and regulations to permit the efficient administration of this subchapter.

**History.** Acts 1995, No. 411, § 8; 1995, No. 419, § 8.

### **5-73-318. Instructor review of applications.**

(a) An instructor authorized to conduct a training course required by this subchapter shall check the application of a student for completeness, accuracy, and legibility.

(b) An instructor who repeatedly fails to comply with subsection (a) of this section may have his or her license to conduct a training course revoked.

**History.** Acts 1997, No. 1239, § 7.

### **5-73-319. Transfer of a license to Arkansas.**

(a) Any person who becomes a resident of Arkansas who has a valid license to carry a concealed handgun issued by a reciprocal state may apply to transfer his or her license to Arkansas by submitting the following to the Department of Arkansas State Police:

- (1) The person's current reciprocal state license;
- (2) Two (2) properly completed fingerprint cards;
- (3) A nonrefundable license fee of thirty-five dollars (\$35.00);
- (4) Any fee charged by a state or federal agency for a criminal history check; and
- (5) A digital photograph of the person or a release authorization to obtain a digital photograph of the person from another source.

(b) After July 31, 2007, the newly transferred license is valid for a period of five (5) years from the date of issuance and binds the holder to all Arkansas laws and regulations regarding the carrying of the concealed handgun.

**History.** Acts 2003, No. 545, § 3; 2007, No. 664, § 26; 2007, No. 1014, § 2.

## **RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of assembly, Criminal Law, Weapons, 26 U. Legislation, 2003 Arkansas General As- Ark. Little Rock L. Rev. 370.

### **5-73-320. License for certain members of the Arkansas National Guard or a reserve component or active duty military personnel.**

(a) The Department of Arkansas State Police may issue a license under this subchapter to a person who:

(1) Is currently serving as a federally recognized commissioned or noncommissioned officer of the National Guard or a reserve component of the United States Armed Forces or an active duty member of the United States Armed Forces;

(2) Submits the following documents:

(A) A completed concealed handgun license application as prescribed by the department;

(B) A form specified by the Director of the Department of Arkansas State Police reflecting the fingerprints of the applicant;

(C) A properly completed and dated certificate from a concealed handgun carry training instructor who is registered with the department;

(D) A live-fire qualification issued or granted by a branch of the United States Armed Forces or, in lieu of a live-fire qualification, a letter dated and personally signed by a commanding officer or his or her designee stating that the applicant:

(i) Is a current member of the National Guard or a reserve component of the United States Armed Forces or an active duty member of the United States Armed Forces;

(ii) Is of good character and sound judgment; and

(iii) Has met the military qualification requirements for issuance and operation of a handgun within one (1) year of the application date;

(E) A copy of the face or photograph side of a current United States Uniformed Services Identification Card, if the applicant is a member of the United States Armed Forces; and

(F) An electronic passport-style photo of the applicant, if the applicant does not hold an Arkansas driver's license or identification card; and

(3) Submits any required fees.

(b) Except as otherwise specifically stated in this section, the license issued under this section is subject to the provisions of this subchapter and any rules promulgated under § 5-73-317.

**History.** Acts 2005, No. 1868, § 1; 2007, No. 664, § 7; 2007, No. 1014, § 3; 2013, No. 989, § 2.

**Amendments.** The 2013 amendment inserted (a)(2)(C) and redesignated former (C) as (D) and added "A live-fire qualification issued or granted by a branch of the

United States armed forces or, in lieu of a live fire qualification" to present (D) and deleted former (iii), (v), and redesignated the remaining subdivisions accordingly; deleted former (D) and added (F); deleted (b) and redesignated former (c) as (b).

### **5-73-321. Recognition of other states' licenses.**

A person in possession of a valid license to carry a concealed handgun issued to the person by another state is entitled to the privileges and subject to the restrictions prescribed by this subchapter.

**History.** Acts 2009, No. 748, § 43; 2013, No. 1089, § 1.

**Amendments.** The 2013 amendment rewrote the section.

### **5-73-322. Concealed handguns in a university, college, or community college building.**

(a) As used in this section:

(1)(A) "Public university, public college, or community college" means an institution that:

(i) Regularly receives budgetary support from the state government;

(ii) Is part of the University of Arkansas or Arkansas State University systems; or

(iii) Is required to report to the Arkansas Higher Education Coordinating Board.



(B) “Public university, public college, or community college” does not include a private university or private college solely because:

(i) Students attending the private university or private college receive state-supported scholarships; or

(ii) The private university or private college voluntarily reports to the Arkansas Higher Education Coordinating Board; and

(2) “Staff member” means a person who is not enrolled as a full-time student at the university, college, or community college and is either employed by the university, college, or community college full time or is on a nine-month or twelve-month appointment at the university, college, or community college as a faculty member.

(b) A licensee may possess a concealed handgun in the buildings and on the grounds, whether owned or leased by the public university, public college, or community college, of the public university, public college, or community college where he or she is employed unless otherwise prohibited by § 5-73-306 if:

(1) He or she is a staff member; and

(2)(A) The governing board of the public university, public college, or community college does not adopt a policy expressly disallowing the carrying of a concealed handgun by staff members in the buildings or on the grounds of the public university, public college, or community college and posts notices as described in § 5-73-306(18).

(B) A governing board of the public university, public college, or community college may adopt differing policies for the carrying of a concealed handgun by staff members for different campuses, areas of a campus, or individual buildings of the public university, public college, or community college for which the governing board is responsible.

(C) A policy disallowing the carrying of a concealed handgun by staff members into the public university, public college, or community college expires one (1) year after the date of adoption and must be readopted each year by the governing board of the public university, public college, or community college to remain in effect.

(c) A licensee may possess a concealed handgun in the buildings and on the grounds of the private university or private college where he or she is employed unless otherwise prohibited by § 5-73-306 if:

(1) He or she is a staff member; and

(2) The private university or private college does not adopt a policy expressly disallowing the carrying of a concealed handgun in the buildings and on the grounds of the private university or private college and posts notices as described in § 5-73-306(18).

(d) The storage of a handgun in a university or college-operated student dormitory or residence hall is prohibited under § 5-73-119(c).

**History.** Acts 2013, No. 226, § 5; 2015, No. 1155, § 16.

**Amendments.** The 2015 amendment

deleted “public” preceding “community college” throughout (b).

RESEARCH REFERENCES

**Ark. L. Rev.** Thomas Christoph Keller, *Arkansas's Teachers*, 67 *Ark. L. Rev.* 687 (2014).  
Comment: ABC's and AR-15's: Arming Ar-

5-73-323. Parole board exemptions.

A member of the Parole Board, a board investigator, or a parole revocation judge who has been issued a license to carry a concealed handgun by the Department of Arkansas State Police under this subchapter may carry his or her concealed handgun into a building in which or a location on which a law enforcement officer may carry a handgun if the board member, board investigator, or parole revocation judge is on official business of the board.

**History.** Acts 2013, No. 320, § 2.

SUBCHAPTER 4 — CONCEALED HANDGUN LICENSE RECIPROCITY

SECTION.

5-73-401. [Repealed.]

5-73-402. [Repealed.]

5-73-401. [Repealed.]

**Publisher's Notes.** This section, concerning handgun license reciprocity, was repealed by Acts 2007, No. 198, § 2, and No. 827, § 104. The section was derived from Acts 1997, No. 789, § 1.  
For current law, see § 5-73-321.

5-73-402. [Repealed.]

**Publisher's Notes.** This section, concerning recognition of other states' permits, was repealed by Acts 2009, No. 748, § 44. The section was derived from Acts 1997, No. 1239, § 13; 2007, No. 198, § 3; 2007, No. 827, § 104.  
For current law, see § 5-73-321.

CHAPTER 74

GANGS

SUBCHAPTER.

- 1. ARKANSAS CRIMINAL GANG, ORGANIZATION, OR ENTERPRISE ACT.
- 2. RECRUITING GANG MEMBERS.

SUBCHAPTER 1 — ARKANSAS CRIMINAL GANG, ORGANIZATION, OR ENTERPRISE ACT

SECTION.

5-74-101. Title.

5-74-102. General legislative findings,

SECTION.

5-74-103. Definitions.

declarations, and intent.

- SECTION.  
5-74-104. Engaging in a continuing criminal gang, organization, or enterprise.  
5-74-105. Unauthorized use of another person's property to facilitate certain crimes.  
5-74-106. Simultaneous possession of drugs and firearms.  
5-74-107. Unlawful discharge of a firearm from a vehicle.

- SECTION.  
5-74-108. Engaging in violent criminal group activity.  
5-74-109. Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies.

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**A.C.R.C. Notes.** Acts 1993, No. 1002, § 4, provided: "All laws and parts of laws in conflict with this act are hereby repealed. However, there is not intent by enactment of the 'Arkansas Criminal Gang, Organization or Enterprise Act' to repeal existing state law governing sub-

stantive criminal offenses, including those mentioned herein, or enhancement of penalties relating to those offenses, and this act is designed to provide alternative remedies to those which exist under current state law."

RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Criminal Law, 16 U. Ark. Little Rock L.J. 91.

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**5-74-101. Title.**

This subchapter shall be known and may be cited as the "Arkansas Criminal Gang, Organization, or Enterprise Act".

**History.** Acts 1993, No. 1002, § 1.

RESEARCH REFERENCES

**ALR.** Validity of Criminal State Racketeer Influenced and Corrupt Organizations Acts and Similar Acts Related to Gang Activity and the Like. 58 A.L.R.6th 385.

**5-74-102. General legislative findings, declarations, and intent.**

- (a)(1) The General Assembly finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, sex, age, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of groups engaging in random crimes of violence, and committing crimes for profit and violent crimes committed to protect or control market areas or "turf".
- (2) It is not the intent of this subchapter to interfere with the constitutional exercise of the protected rights and freedoms of expression and association.



(3) The General Assembly recognizes the right of every citizen to harbor and constitutionally express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(b)(1) The General Assembly further finds that the State of Arkansas is experiencing an increase in crime committed by criminal gangs, organizations, or enterprises.

(2) These criminal gangs, organizations, or enterprises support themselves by engaging in criminal activity for profit, most commonly through the distribution of controlled substances and theft of property.

(3) These criminal gangs, organizations, or enterprises are becoming increasingly sophisticated at avoiding arrest and prosecution.

(4) With increasing frequency, criminals are using the property of another person which has been stolen, borrowed, leased, or maintained in another person's name to avoid detection and identification.

(5) This is particularly common among members and associates of criminal gangs, organizations, and enterprises.

(6) There is strong evidence that this increased sophistication is due largely to contact with other criminal gangs, organizations, or enterprises from other states.

(c)(1) The General Assembly further finds that criminal gangs, organizations, and enterprises control their market areas by terrorizing the peaceful citizens in their neighborhoods with deliberate and random acts of violence.

(2) "Drive-by" shootings are becoming all too common in many Arkansas cities.

(3) One of the primary reasons for the increased homicide rate is the use of firearms by criminal gangs, organizations, or enterprises to control the crack cocaine market within their geographical "turf".

(d)(1) The General Assembly further finds that in addition to the activity of street gangs, there are also other types of criminal organizations or enterprises operating in Arkansas.

(2) Some examples are garages that take parts from stolen automobiles, burglary or retail theft rings, and narcotics distribution organizations.

(3) The number of crimes committed by criminal organizations of all types is increasing.

(4) These ongoing organized criminal activities present a clear and present danger to public order and safety and are not constitutionally protected.

(e)(1) It is the intent of the General Assembly to use as a model the federal continuing criminal enterprise statute, 21 U.S.C. § 848.

(2) This should provide law enforcement officers, prosecutors, and our courts with ample case law to guide in the interpretation of the language and the legislative intent.

(3) It is furthermore the intent of the General Assembly to focus the state's law enforcement agencies and prosecutors on investigating and

prosecuting all ongoing organized criminal activity and to provide for penalties that will punish and deter organized ongoing criminal activity.

**History.** Acts 1993, No. 1002, § 1; 1995, No. 1296, § 9.

RESEARCH REFERENCES

**Ark. L. Notes.** Brian Gallini & Britta Stamps, Does Proving Predicate Offenses in Arkansas Require Proof Beyond a Reasonable Doubt?, 2013 Ark. L. Notes 1520.

CASE NOTES

**In General.**

The General Assembly intended to address violence in the drug trade by making laws tougher on drug dealers who use

firearms. Manning v. State, 330 Ark. 699, 956 S.W.2d 184 (1997).

**Cited:** Curtis v. State, 76 Ark. App. 458, 68 S.W.3d 305 (2002).

5-74-103. Definitions.

As used in this subchapter:

(1) “Crime of pecuniary gain” means any violation of Arkansas law that results, or was intended to result, in the defendant receiving income, benefit, property, money, or anything of value;

(2) “Crime of violence” means any violation of Arkansas law if a person purposely or knowingly causes, or threatens to cause, death or physical injury to another person, specifically including rape;

(3) “Criminal gang, organization, or enterprise” means any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses that are undertaken in concert with each other; and

(4) “Predicate criminal offense” means any violation of Arkansas law that is a crime of violence or a crime of pecuniary gain.

**History.** Acts 1993, No. 1002, § 1.

RESEARCH REFERENCES

**Ark. L. Notes.** Brian Gallini & Britta Stamps, Does Proving Predicate Offenses in Arkansas Require Proof Beyond a Reasonable Doubt?, 2013 Ark. L. Notes 1520.

CASE NOTES

**Crime of Violence.**

Allowing defendant’s release on a bed-space bond under § 16-90-122 was erroneous because the release of offenders was only allowed if they were nonviolent in nature; defendant pled guilty to two

counts of unlawful discharge of a firearm from a vehicle, which was a crime of violence under this section. State v. Britt, 368 Ark. 273, 244 S.W.3d 665 (2006).

**Cited:** Jones v. State, 333 Ark. 208, 969 S.W.2d 618 (1998).

**5-74-104. Engaging in a continuing criminal gang, organization, or enterprise.**

(a)(1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the first degree if he or she:

(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and

(B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management.

(2) A person who engages in a continuing criminal gang, organization, or enterprise in the first degree is guilty of a felony two (2) classifications higher than the classification of the highest underlying predicate criminal offense referenced in subdivision (a)(1)(A) of this section.

(b)(1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the second degree if he or she:

(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and

(B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2) or more other persons, but with respect to whom that person does not occupy the position of organizer, a supervisory position, or any other position of management.

(2) A person who engages in a continuing criminal gang, organization, or enterprise in the second degree is guilty of a felony one (1) classification higher than the classification of the highest underlying predicate criminal offense referenced in subdivision (b)(1)(A) of this section.

(c) A person who engages in a continuing criminal gang, organization, or enterprise when the underlying predicate criminal offense is a Class A felony or a Class Y felony is guilty of a Class Y felony.

(d) Any sentence of imprisonment imposed pursuant to this section is in addition to any sentence imposed for the violation of a predicate criminal offense.

**History.** Acts 1993, No. 1002, § 1.

**RESEARCH REFERENCES**

**ALR.** Validity of Criminal State Racketeer Influenced and Corrupt Organizations Acts and Similar Acts Related to Gang Activity and the Like. 58 A.L.R.6th 385.

**Ark. L. Notes.** Brian Gallini & Britta Stamps, Does Proving Predicate Offenses in Arkansas Require Proof Beyond a Reasonable Doubt?, 2013 Ark. L. Notes 1520.



CASE NOTES

ANALYSIS

In Concert.  
Predicate Criminal Offense.

**In Concert.**

Defendant’s conviction for first-degree continuing-criminal-enterprise in connection with the possession and uttering of counterfeit money was reversed and dismissed as defendant did not act in concert with two other individuals; evidence established that defendant had the first individual pass a counterfeit one-hundred-dollar bill at a store, but the first

individual testified that defendant had assured her that the bill was real and, while the second individual was visiting defendant, defendant offered him a one-hundred-dollar bill in exchange for twenty dollars, but the second individual refused that offer. *Taylor v. State*, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

**Predicate Criminal Offense.**

A predicate criminal offense for the purposes of this section need not be proved by a conviction or even a formal charge. *Garling v. State*, 334 Ark. 368, 975 S.W.2d 435 (1998).

**5-74-105. Unauthorized use of another person’s property to facilitate certain crimes.**

(a)(1) A person commits the offense of unauthorized use of another person’s property to facilitate a crime if he or she knowingly uses the property of another person to facilitate in any way the violation of a predicate criminal offense without the owner’s knowledge.

(2) A violation of this section is a Class B felony.

(b) The State of Arkansas is the victim in any violation of this section.

**History.** Acts 1993, No. 1002, § 1.

RESEARCH REFERENCES

**Ark. L. Notes.** Brian Gallini & Britta in Arkansas Require Proof Beyond a Reasonable Doubt?, 2013 Ark. L. Notes 1520.  
Stamps, Does Proving Predicate Offenses

CASE NOTES

ANALYSIS

Constitutionality.  
—Federal Law.  
Elements.

**Constitutionality.**

**—Federal Law.**

The Supreme Court did not allow the State an Ark. R. Crim. P. 36.10 appeal because no substantial question of former jeopardy existed when federal and state offenses and proceedings were involved;

since the state offense involving interpretation of subdivision (a)(1) of this section and § 5-74-107(b)(1) would not come into issue in the same manner due to a decision concerning the unconstitutionality of a federal law, Arkansas’s correct and uniform administration of the criminal law was not in issue. *State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995).

**Elements.**

This section does not require an element of gang activity. *Morgan v. State*, 2016 Ark. App. 31 (2016).

### 5-74-106. Simultaneous possession of drugs and firearms.

(a) A person shall not unlawfully commit a felony violation of §§ 5-64-419 — 5-64-442 or unlawfully attempt, solicit, or conspire to commit a felony violation of §§ 5-64-419 — 5-64-442 while in possession of:

(1) A firearm; or

(2) Any implement or weapon that may be used to inflict serious physical injury or death, and that under the circumstances serves no apparent lawful purpose.

(b) Any person who violates this section is guilty of a Class Y felony.

(c) This section does not apply to a misdemeanor drug offense.

(d) It is a defense to this section that the defendant was in his or her home and the firearm or other implement or weapon was not readily accessible for use.

**History.** Acts 1993, No. 1002, § 1; 2007, No. 827, § 105; 2011, No. 570, § 70.

**A.C.R.C. Notes.** Acts 2011, No. 570, § 1, provided: “The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs.”

**Amendments.** The 2011 amendment, in the introductory language of (a), substituted “§ 5-64-419 — § 5-64-442” for “§ 5-64-401” twice.

**Cross References.** Uniform Controlled Substances Act — Prohibitions and Penalties, § 5-64-401 et seq.

### CASE NOTES

#### ANALYSIS

Constitutionality.

Purpose.

Constructive Possession.

Defense.

Double Jeopardy.

Elements of Offense.

Evidence.

Preservation for Review.

Readily Accessible.

Sentence.

—Suspension Prohibited.

#### Constitutionality.

This section does not unconstitutionally overlap or conflict with § 5-73-120. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

This section does not violate the federal constitutional right to bear arms. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

#### Purpose.

This section not only serves the purpose of deterring organized gang and criminal activities, but also serves the broader purpose of curtailing any person’s use of a

firearm when he or she is involved in the illegal possession or trafficking of controlled substances. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

#### Constructive Possession.

State did not have to show that defendant physically possessed the handgun in order to sustain a conviction under this section for its possession if the gun’s location was such that it was under defendant’s dominion and control; the gun in defendant’s kitchen next to items used to manufacture methamphetamine sufficiently met that burden. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003) (decided under former § 5-64-401).

Evidence of drugs and firearms, both found in defendant’s locked bedroom, provided sufficient evidence for a conviction of simultaneous possession under this section because defendant had the only key to the bedroom, which was deemed to give him constructive possession, and defendant did not qualify for the exemption under subsection (d) of this section because he was not home at the time of the search and the firearms were easily acces-

sible. *Ibarra v. State*, 2009 Ark. App. 707 (2009).

For purposes of defendant's convictions, his absence at the time of the search did not eliminate a conclusion of constructive possession based on the fact that the drugs and firearm were found in a bedroom closet in close proximity, the bedroom was shared by defendant and another, defendant was at the house prior to the search, and he admitted purchasing the marijuana and possessing the firearm, which inferred more than mere knowledge of the contraband, but also ownership and control over them. *Dotson v. State*, 2013 Ark. App. 550 (2013).

There was sufficient evidence to support convictions for possession of marijuana with intent to deliver and the simultaneous possession of drugs and firearms based on drugs that were discovered behind a shed; defendant emerged from behind the shed, in close proximity to the drugs, there was no possibility that the drugs could have been tossed from a road, and the bag of drugs was clean and dry, despite the rain. Defendant began acting nervous and making spontaneous statements when it was obvious that officers were going to search behind the shed, defendant had a large amount of cash when he was arrested, and he admitted to having a gun. *Block v. State*, 2015 Ark. App. 83, 455 S.W.3d 336 (2015).

### **Defense.**

Defendant, who waited outside his residence during a police search of his residence during which officers found a nine millimeter pistol in a sock along with methamphetamine, could not avail himself of the defense to the charge of simultaneous possession of a firearm contained in subsection (d) of this section; the defense requires that defendant be in the home when the handgun is being discovered. *Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002).

To the extent defendant argued that he could not be found guilty of simultaneous possession of drugs and a firearm because he was not present when the gun and drugs were found and the gun was not readily accessible to him, that defense was not available to him, as he was not in his home during the search. *Dotson v. State*, 2013 Ark. App. 550 (2013).

### **Double Jeopardy.**

There was no double jeopardy violation where defendant was sentenced for both possession with intent to deliver a controlled substance and simultaneous possession of drugs and firearms; the legislature made it clear that it wished to assess an additional penalty for simultaneously possessing drugs and a firearm. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

### **Elements of Offense.**

Evidence of gang-related activity is not required to establish a violation of this section. *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

### **Evidence.**

Evidence held sufficient to support simultaneous possession. *Mitchell v. State*, 321 Ark. 570, 906 S.W.2d 307 (1995).

There was substantial evidence that defendant knew of and had control of contraband, possessed it with the intent to deliver, had simultaneous possession of cocaine and firearm, and that he was a felon in possession of a firearm. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995).

Evidence held sufficient where (1) while most of the controlled substance was found in a car's rear fender well, some was found in the front passenger seat, (2) a pistol was found on the floor behind the driver's seat, and (3) the defendant was the sole occupant of the car. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

Evidence was sufficient to support a conviction where, upon executing a search warrant at the defendant's house, the police found (1) 10 grams of pure methamphetamine in the defendant's pants pocket, (2) drug paraphernalia throughout the house, (3) an unloaded handgun in the living room, with a bag with ammunition in a nearby paper bag, and (4) bills and receipts with the defendant's name on them in close proximity to the handgun. *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000).

Stop was not justified where there was no testimony that the officer was investigating or preventing a crime when she



encountered defendant, therefore, the search was illegal and defendant's motion to suppress the evidence of the cocaine and the firearm should have been granted. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

Evidence was insufficient to support a conviction for simultaneous possession of a controlled substance and a firearm where (1) after stopping a vehicle operated by the defendant and a vehicle operated by his cousin's boyfriend, the defendant was not allowed to continue driving because of his level of intoxication and his vehicle was subjected to an inventory search in preparation for towing, and (2) during the search, a suitcase containing marijuana was found in the trunk, but (3) the cousin's boyfriend asked the defendant to carry the suitcase in his trunk, the suitcase was found with other items belonging to the cousin and her boyfriend, (4) the marijuana was well-wrapped inside several bags and no odor emanated from the suitcase, (5) the cousin's boyfriend's fingerprint was found on one of the plastic bags, whereas the defendant's fingerprints were not found on any of the items seized by the state, and (6) the reason for the defendant's trip was to visit his sick brother, who died during the pendency of the trial. *Boston v. State*, 69 Ark. App. 155, 12 S.W.3d 245 (2000).

Evidence was sufficient to support a conviction where (1) the defendant's girlfriend testified that she observed the defendant asleep with his gun either laying on his chest or in his hand, that the gun had a laser sight on it, and that she also observed a bag of drugs near him, and (2) a police officer testified that he found the gun on the floor in the room where the defendant had fallen asleep and described the general connection between firearms and drugs, testifying that of the 50 methamphetamine labs he had seen in the last three years, he could not recall one in which a firearm was not found. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001).

Evidence was sufficient to support a conviction, notwithstanding the defendant's assertion that she did not possess a useable amount of the controlled substance, where she was convicted of manufacture of methamphetamine and she abandoned her argument that there was insufficient evidence presented by the state to prove that she possessed a fire-

arm. *Harris v. State*, 73 Ark. App. 185, 44 S.W.3d 347 (2001).

Evidence was sufficient to convict defendant of simultaneous possession of drugs and firearms, in violation of this section, because the police discovered loaded weapons in the same out-building where methamphetamine had recently been manufactured. *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004).

Evidence was sufficient to convict defendant of drug possession charges given that a crack house was rented to him, a confidential informant testified that he purchased drugs from defendant a day earlier, the serial numbers of money found on defendant matched the money used in the controlled buy, and drugs were in plain view in the home. *Carter v. State*, 2010 Ark. 293, 367 S.W.3d 544 (2010).

There was substantial evidence that defendant exercised care, control, and management over the contraband, where (1) he lived at the house where the contraband was discovered, (2) a police officer found several illegal items lying in close proximity to defendant, and (3) there was no evidence that there were other suspects in the home at the time of the raid that may have also lived there. *Allen v. State*, 2010 Ark. App. 266 (2010).

When defendant was convicted of simultaneously possessing drugs and firearms, in violation of this section, sufficient evidence supported a jury's finding that defendant possessed a firearm because (1) defendant told police a gun found in defendant's wife's purse belonged to defendant, (2) defendant and defendant's wife were in defendant's car, in which the purse was found, together when police pulled up behind the car, and (3) defendant fled when police tried to arrest defendant, after finding a marijuana cigarette in the car. *Patton v. State*, 2010 Ark. App. 453 (2010).

Defendant's conviction for simultaneous possession of drugs and firearms was proper because the evidence to support the conviction was overwhelming and confirmed by testimony of a woman who was living with defendant in the motel room where the evidence was found; inside the motel room, investigators discovered defendant's personal identification and other personal paperwork, substantial amounts of marijuana and other drugs, two firearms, drug paraphernalia, and a

ledger of drug transactions. *Mathis v. State*, 2010 Ark. App. 665 (2010).

Evidence was sufficient to convict defendant of possession of cocaine and simultaneous possession of drugs and firearms, because the jury could reasonably conclude that defendant had knowledge of the cocaine and exercised care, control, and management of the cocaine, and defendant constructively possessed the cocaine and he did so while in possession of a firearm; the cocaine was found at a location that was level with the driver's knee and defendant was in close proximity to the drugs, and the handgun was located inside the vehicle. *Boykin v. State*, 2012 Ark. App. 274, 409 S.W.3d 321 (2012).

In a case involving drugs and weapons offenses, it was error to allow a video of law enforcement officers firing a weapon found in the search of the home to be played for the jury and admitted into evidence because it was not relevant to any of the specific offenses charged as the offenses did not require that the weapon be fireable; however, the error was harmless because the evidence against defendant was overwhelming and defendant's sentences fell within the statutory sentence ranges. *Gutierrez v. State*, 2015 Ark. App. 516, 472 S.W.3d 147 (2015).

### **Preservation for Review.**

When defendant was convicted of simultaneously possessing drugs and firearms, in violation of this section, defendant did not waive, for appellate review, the issue of whether sufficient evidence showed defendant possessed a firearm by not renewing a directed verdict motion at the close of all evidence because defendant moved for a directed verdict at the close of the state's evidence, and defendant did not present any evidence. *Patton v. State*, 2010 Ark. App. 453 (2010).

### **Readily Accessible.**

A loaded handgun, although wrapped in a ski mask in a closet in a different room, was within defendant's easy reach and was therefore "readily accessible for use." *Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997).

The defendant's conviction for simultaneous possession of a controlled substance and a firearm was reversed where a .22 caliber rifle was recovered from the kitchen of her residence, but the rifle was

not readily accessible for use because it was not loaded, and no ammunition was recovered. *Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001).

Evidence was sufficient to convict defendant of simultaneous possession of drugs and firearms under this section and defendant could not avail himself of the defense in subsection (d) as he possessed methamphetamine and a gun was accessible for use because it was in plain sight on a night stand with an ammunition clip nearby and the gun could have easily been loaded. *Arroyo v. State*, 2011 Ark. App. 523 (2011).

Sufficient evidence supported defendant's conviction for simultaneous possession of drugs and firearms because (1) ammunition found at the scene of defendant's arrest did not have to be introduced, (2) a detective testified a loaded gun was found, and (3) a photo of ammunition taken from the gun's chamber was introduced, so there was substantial evidence that at least one gun was "readily accessible for use." *Kourakis v. State*, 2015 Ark. App. 612, 474 S.W.3d 536 (2015).

### **Sentence.**

Sentencing may not be other than in accordance with the statute in effect at the time of the commission of the crime, and where the law does not authorize the particular sentence pronounced by a trial court, that sentence is unauthorized and illegal. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

When a defendant is convicted of a Class Y felony, the General Assembly has specifically provided that a trial court shall not suspend imposition of sentence as to a term of imprisonment or place the defendant on probation. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

### **—Suspension Prohibited.**

The trial court had no statutory authority to suspend the imposition of sentence or to suspend execution of the 10-year sentence on the Class Y felony charge of simultaneous possession of drugs and firearms. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

Defendant's conviction for simultaneous possession of drugs and firearms was a violation of this section and a Class Y felony, and under § 5-4-401(a)(1), a defendant convicted of a Class Y felony was to



be sentenced to not less than 10 years; consequently, the trial court erred in suspending 4 years of the 10-year sentence imposed upon defendant. *State v. Fountain*, 350 Ark. 437, 88 S.W.3d 411 (2002).

**Cited:** *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997); *Curtis v. State*, 76 Ark. App. 458, 68 S.W.3d 305 (2002).

### **5-74-107. Unlawful discharge of a firearm from a vehicle.**

(a)(1) A person commits unlawful discharge of a firearm from a vehicle in the first degree if he or she knowingly discharges a firearm from a vehicle and by the discharge of the firearm causes death or serious physical injury to another person.

(2) Any person who is guilty of unlawfully discharging a firearm from a vehicle in the first degree commits a Class Y felony.

(b)(1) A person commits unlawful discharge of a firearm from a vehicle in the second degree if he or she recklessly discharges a firearm from a vehicle in a manner that creates a substantial risk of physical injury to another person or property damage to a home, residence, or other occupiable structure.

(2) Any person who is guilty of unlawfully discharging a firearm from a vehicle in the second degree commits a Class B felony.

(c)(1)(A) Any vehicle or property used by the owner, or anyone acting with the knowledge and consent of the owner, to facilitate a violation of this section is subject to forfeiture.

(B) This is a new and independent ground for forfeiture.

(2)(A) Property that is forfeitable based on this section is forfeited pursuant to and in accordance with the procedures for forfeiture in §§ 5-64-505 and 5-64-509 [repealed].

(B) The reference to §§ 5-64-505 and 5-64-509 [repealed] is procedural only, and it is not a defense to forfeiture under this section that the shooting did not involve a controlled substance.

**History.** Acts 1993, No. 1002, § 1.

**Cross References.** Terroristic act, § 5-13-310.

### **CASE NOTES**

#### **ANALYSIS**

Constitutionality.

—Federal Law.

Crime of Violence.

Evidence Sufficient.

**Constitutionality.**

—Federal Law.

The Supreme Court did not allow the State an Ark. R. Crim. P. 36.10 appeal because no substantial question of former jeopardy existed when federal and state offenses and proceedings were involved;

since the state offense involving interpretation of § 5-74-105(a)(1) and subdivision (b)(1) of this section would not come into issue in the same manner due to a decision concerning the unconstitutionality of a federal law, Arkansas's correct and uniform administration of the criminal law was not in issue. *State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995).

**Crime of Violence.**

Allowing defendant's release on a bed-space bond under § 16-90-122 was erroneous because the release of offenders was only allowed if they were nonviolent in



nature; defendant pled guilty to two counts of unlawful discharge of a firearm from a vehicle, which was a crime of violence under § 5-74-103. *State v. Britt*, 368 Ark. 273, 244 S.W.3d 665 (2006).

#### **Evidence Sufficient.**

Evidence supported defendant's convictions for second-degree unlawful discharge of a firearm from a vehicle under this section because (1) an employee at a fast food restaurant that was located in a gas station testified that she saw defendant shooting toward the gas station; (2) a gas station employee and a third witness testified that they witnessed gunfire from a black vehicle toward the gas station; (3) while the gas station employee and the third witness did not actually see defendant shooting the gun from the black vehicle, there was substantial evidence that defendant was the only person in the vehicle at the time of the shooting; (4) not one witness at the gas station testified that they saw another individual in the vehicle; (5) the third witness pursued defendant from the gas station until just a couple of minutes before he was arrested; and (6) when defendant was arrested, the vehicle was searched, no other individual was found, and a gun casing (that matched the gun that defendant threw out of the window of his vehicle after the shooting) fell out of his lap. *McBride v. State*, 99 Ark. App. 146, 257 S.W.3d 914 (2007).

At trial for capital murder and unlawful discharge of a firearm from a vehicle, witnesses' in-court identifications of de-

fendant were not so unreliable that his conviction should be overturned because: (1) the jury clearly found the witnesses and their identifications of defendant credible; (2) defendant did not challenge or object to the witnesses' in-court identifications when they were made, but instead attempted to discredit their testimony on cross-examination; and (3) he merely challenged the in-court identifications in the context of his challenge to the sufficiency of the evidence. *Davenport v. State*, 373 Ark. 71, 281 S.W.3d 268 (2008).

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer's vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. *Barber v. State*, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

**Cited:** *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Nelson v. State*, 324 Ark. 404, 921 S.W.2d 593 (1996); *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 915 (1996).

### **5-74-108. Engaging in violent criminal group activity.**

(a) Any person who violates any provision of Arkansas law that is a crime of violence while acting in concert with two (2) or more other persons is subject to enhanced penalties.

(b) Upon conviction of a crime of violence committed while acting in concert with two (2) or more other persons, the classification and penalty range is increased by one (1) classification.

(c) The fact that the group was not a criminal gang, organization, or enterprise is not a defense to prosecution under this section.

**History.** Acts 1993, No. 1002, § 1.

## RESEARCH REFERENCES

**ALR.** Validity of Criminal State Racketeer Influenced and Corrupt Organizations Acts and Similar Acts Related to

Gang Activity and the Like. 58 A.L.R.6th 385.

## CASE NOTES

## ANALYSIS

Constitutionality.  
Enhanced Classification.  
Evidence.  
Sufficiency of Evidence.

**Constitutionality.**

This section conveys fair and sufficient warning when measured by common understanding and, therefore, is not unconstitutionally vague. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998).

**Enhanced Classification.**

Engaging in violent criminal activity as enumerated in this section would not be a Class D felony in itself but rather would raise a third-degree battery Class A misdemeanor to a Class D felony. *B.J. v. State*, 56 Ark. App. 35, 937 S.W.2d 675 (1997).

Engaging in violent criminal activity is merely an enhancement of punishment statute, not a substantive offense. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998).

**Evidence.**

Trial court did not err in admitting photographs from defendant's Facebook page to show that she was engaging in violent, criminal group activity by violating Arkansas law while acting in concert with two or more persons in violation of this section. *Williamson v. State*, 2011 Ark. App. 73, 381 S.W.3d 134 (2011).

**Sufficiency of Evidence.**

Defendants' sentences were improperly enhanced under this section for committing assault "in concert" with two or more other persons because, even assuming that the evidence was sufficient to support a finding that three people were involved in a melee directed at the victim, the evidence was insufficient to show that any third person acted "in concert" with the two defendants. Evidence of mutual agreement in a common plan or enterprise was lacking. *Johnson v. State*, 2010 Ark. App. 252 (2010).

## **5-74-109. Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies.**

(a) **INTENT.** The intent of the General Assembly in this section is to enact civil remedies that eliminate the availability of any premises for use in the commission of a continuing series of criminal offenses.

(b) **COMMON NUISANCE DECLARED.** Any premises, building, or place used to facilitate the commission of a continuing series of three (3) or more criminal violations of Arkansas law is declared to be detrimental to the law-abiding citizens of the state and may be subject to an injunction, a court-ordered eviction, or a cause of action for damages as provided for in this subchapter.

(c) **ACTION TO ABATE — PERMANENT INJUNCTION — VERIFICATION OF COMPLAINT.** (1) When there is reason to believe a common nuisance under subsection (b) of this section is kept or maintained, or exists in any county, the prosecuting attorney of the county in the name of the state, or the city attorney of any incorporated city, or any citizen of the state or a resident of the county in his or her own name, may enjoin



permanently the person conducting or maintaining the nuisance and the owner, lessee, or agent of the building or place in or upon which the nuisance exists from directly or indirectly maintaining or permitting the nuisance.

(2) Unless filed by the prosecuting attorney, the complaint in the action shall be verified.

(d) **INSPECTION WARRANT.** When there is reasonable cause to believe that any premises is being maintained in violation of this section, any judicial officer may, upon the petition of the prosecuting attorney, issue an inspection warrant for the premises.

(e) **TEMPORARY INJUNCTION — BOND REQUIRED — EXCEPTIONS.**

(1) If the existence of the nuisance is shown in the action to the satisfaction of the court, the court shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of the nuisance.

(2)(A) On granting the temporary writ, the court shall require a bond on the part of the applicant to the effect that the applicant shall pay to the enjoined defendant such damages, not exceeding an amount to be specified, as the defendant sustains by reason of the injunction should the court finally decide that the applicant was not entitled to the injunction.

(B) No bond is required when the proceeding is instituted by the prosecuting attorney or city attorney.

(f) **PRECEDENCE OF ACTION — EXCEPTIONS.** The action shall be filed in the circuit court and have precedence over all other actions except election contests and hearings on injunctions.

(g) **DISMISSAL FOR WANT OF PROSECUTION.** If the complaint is filed by a citizen, it shall not be dismissed by him or her or for want of prosecution except upon a sworn statement made by him or her setting forth the reasons why the action shall be dismissed, and by dismissal ordered by the court.

(h) **COSTS.** If the action is brought by a citizen and the court finds there was reasonable ground or cause for the action, costs shall be assessed against him or her.

(i) **ORDER OF ABATEMENT — LIEN FOR COSTS — ENFORCEMENT.**

(1) If the existence of the nuisance is established in the action, an order of abatement shall be entered as part of the judgment in the case, and the plaintiff's costs in carrying out the order are a lien upon the building or place.

(2) The lien is enforceable and collectible for execution issued by order of the court.

(j) **ORDER OF ABATEMENT — DAMAGES.**

(1) If the existence of the nuisance is established in the action, an order of abatement shall be entered as part of the judgment, and the order shall direct the removal from the building or place of all fixtures and other movable property used in conducting, maintaining, aiding, or abetting the nuisance and shall direct their sale in the manner provided for the sale of chattels under execution.



(2)(A) The order shall provide for any appropriate equitable relief as determined by the court to be necessary to abate the nuisance and may further provide, if determined to be the least restrictive alternative available to effectively accomplish the abatement, for the effectual closing of the building or place for such period of time as determined to be necessary by the court as adequate to abate the nuisance.

(B) An alternative to closure may be considered only as provided in this section.

(3)(A)(i) If the court finds that any vacancy resulting from closure of the building or place may create a nuisance or that closure is otherwise harmful to the community, in lieu of ordering the building or place closed, the court may order the person who is seeking to keep the premises open to pay damages in an amount equal to the fair market rental value of the building or place, for such period of time as determined appropriate by the court, to the city attorney or county prosecutor.

(ii) These funds are to be used to investigate and litigate future nuisance abatement actions, or the funds are to be used by the city or county in whose jurisdiction the nuisance is located for the purpose of carrying out its drug prevention and education programs.

(iii) If awarded to a city, eligible programs may include those developed as a result of cooperative programs among schools, community agencies, and the local enforcement agency.

(iv) If awarded to a county, funds shall be used for those programs that are part of any county program in place or used by the county law enforcement agency.

(v) These funds shall not be used to supplant existing city, county, state, or federal resources used for drug prevention and education programs.

(B)(i) For purpose of this subdivision (j)(3), the actual amount of rent being received for the rent of the building or place, or the existence of any vacancy in the building or place, may be considered, but shall not be the sole determinant of the fair market rental value.

(ii) Expert testimony may be used to determine the fair market rental value.

(4)(A) In addition, the court may award damages equal to the plaintiff's cost in the investigation and litigation of the abatement action, not to exceed five thousand dollars (\$5,000), against any defendant based upon the severity of the nuisance and its duration.

(B) The damages may be collected in any manner provided for the collection of any civil judgment.

(k) CUSTODY OF BUILDING. While the order of abatement remains in effect, the building or place is in the custody of the court.

(l) FEES — CLOSING OF BUILDING OR PLACE. For removing and selling the movable property, the city, county, or responsible law enforcement agency is entitled to charge and receive the same fees as could be charged and received for levying upon and selling like property on

execution, and for closing the premises and keeping the premises closed, a reasonable sum shall be allowed by the court.

(m) **DISPOSITION OF SALE PROCEEDS.** The proceeds of the sale of the movable property shall be applied as follows:

- (1) First, to the fees and costs of the removal and sale;
- (2) Second, to the allowances and costs of closing and keeping closed the building or place;
- (3) Third, to the payment of the plaintiff's costs in the action; and
- (4) Fourth, the balance, if any, to the owner of the property.

(n) **RELEASE OF THE BUILDING TO OWNER.**

(1) If the owner of the building or place has not been guilty of any contempt of court in the proceedings and appears and pays all costs, fees, and allowances that are liens on the building or place and files a bond in the full value of the property conditioned that the owner shall immediately abate any nuisance that may exist at the building or place and prevent it from being a nuisance within a period of one (1) year thereafter, the court may, if satisfied of the owner's good faith, order the building or place to be delivered to the owner and the order of abatement cancelled so far as it may relate to the property.

(2) The release of property under a provision of this section does not release it from any judgment, lien, penalty, or liability to which it may be subject.

(o) **FINE AS LIEN — ENFORCEMENT.**

(1) When the owner of a building or place upon which the act or acts constituting contempt have been committed, or the owner of any interest in the building or place, has been guilty of contempt of court and fined in any proceeding under this subchapter, the fine is a lien upon the building or place to the extent of his or her interest in it.

(2) The lien is enforceable and collectible by execution issued by order of the court.

(p) **VIOLATIONS — CRIMINAL PENALTIES.** A violation of or disobedience of an injunction or order for abatement is punishable as contempt of court by a fine of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not less than one (1) month nor more than six (6) months, or by both.

(q) **FORFEITURE.**

(1) This section does not provide for the property to be forfeited to the state.

(2) However, the state may at any time amend its petition to seek forfeiture if the property is subject to forfeiture under other Arkansas law.

**History.** Acts 1993, No. 1002, § 1; § 14-54-1701 et seq. 1995, No. 1296, § 10.

**Cross References.** Common nuisance § 16-105-402. Municipal corporations' powers and restrictions, § 14-54-102.

Prostitution, § 5-70-102.

Criminal nuisance abatement boards,

## CASE NOTES

### Nuisance Not Found.

Strip mall store was not a common nuisance under subsection (b) of this section because the circuit court's finding of no facilitation or linkage was not clearly against the preponderance of the evidence, when the police detective testified that the store had not been involved either directly or indirectly with any of the shootings, and the evidence showed the

store had taken extensive measures to curb the criminal activity at or near the strip mall property, including hiring security guards, installing flood lights and surveillance cameras, and building a fence to keep loiterers from going behind the building. *City of Little Rock v. Jung Yul Rhee*, 375 Ark. 491, 292 S.W.3d 292 (2009).

## SUBCHAPTER 2 — RECRUITING GANG MEMBERS

### SECTION.

5-74-201. Legislative findings.

5-74-202. Definitions.

5-74-203. Soliciting or recruiting a minor

to join or to remain a member of a criminal gang, organization, or enterprise.

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**Effective Dates.** Acts 1994 (2nd Ex. Sess.), Nos. 33 and 34, § 7: Aug. 25, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that street gangs have become rampant in our communities and that such gangs recruit minors to

engage in criminal activity. Therefore, in order to create the crime of soliciting a minor to join a street gang, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

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### 5-74-201. Legislative findings.

(a)(1) The General Assembly finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, sex, age, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of groups engaging in random crimes of violence, and committing crimes for profit and violent crimes committed to protect or control market areas or "turf".

(2) It is not the intent of this subchapter to interfere with the constitutional exercise of the protected rights and freedoms of expression and association.

(3) The General Assembly recognizes the right of every citizen to harbor and constitutionally express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(b)(1) The General Assembly further finds that the State of Arkansas is experiencing an increase in crime committed by criminal gangs, organizations, or enterprises.



(2) These criminal gangs, organizations, or enterprises support themselves by engaging in criminal activity for profit, most commonly through the distribution of controlled substances and theft of property.

(3) These criminal gangs, organizations, or enterprises are becoming increasingly sophisticated at avoiding arrest and prosecution.

(4) With increasing frequency, criminals are using the property of another person which has been stolen, borrowed, leased, or maintained in another person's name to avoid detection and identification.

(5) This is particularly common among members and associates of criminal gangs, organizations, and enterprises.

(6) There is strong evidence that this increased sophistication is due largely to contact with other criminal gangs, organizations, or enterprises from other states.

(c)(1) The General Assembly further finds that criminal gangs, organizations, and enterprises control their market areas by terrorizing the peaceful citizens in their neighborhoods with deliberate and random acts of violence.

(2) "Drive-by" shootings are becoming all too common in many Arkansas cities.

(3) One of the primary reasons for the increased homicide rate is the use of firearms by criminal gangs, organizations, or enterprises to control the crack cocaine market within their geographical "turf".

(d)(1) The General Assembly further finds that in addition to the activity of street gangs, there are also other types of criminal organizations or enterprises operating in Arkansas.

(2) Some examples are garages that take parts from stolen automobiles, burglary or retail theft rings, and narcotics distribution organizations.

(3) The number of crimes committed by criminal organizations of all types is increasing.

(4) These ongoing organized criminal activities present a clear and present danger to public order and safety and are not constitutionally protected.

**History.** Acts 1994 (2nd Ex. Sess.), No. 33, § 1; 1994 (2nd Ex. Sess.), No. 34, § 1; 1995, No. 1296, § 11.

## **5-74-202. Definitions.**

As used in this subchapter:

(1) "Crime of pecuniary gain" means any violation of Arkansas law that results, or was intended to result, in the defendant's receiving income, benefit, property, money, or anything of value;

(2) "Crime of violence" means any violation of Arkansas law if a person purposely or knowingly causes, or threatens to cause, death or physical injury to another person, specifically including rape, § 5-14-103;

(3) “Criminal gang, organization, or enterprise” means any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses that are undertaken in concert with each other; and

(4) “Predicate criminal offense” means any violation of Arkansas law that is a crime of violence or a crime of pecuniary gain.

**History.** Acts 1994 (2nd Ex. Sess.), No. 33, § 2; 1994 (2nd Ex. Sess.), No. 34, § 2.

**5-74-203. Soliciting or recruiting a minor to join or to remain a member of a criminal gang, organization, or enterprise.**

(a) Any person who by intimidation or duress causes, aids, abets, encourages, solicits, or recruits a minor to become or to remain a member of any group that the person knows to be a criminal gang, organization, or enterprise that falls into the definition and intent of this subchapter is guilty of a Class C felony.

(b) Any person who is found guilty of or who pleads guilty or nolo contendere to a second or subsequent violation of this section is guilty of a Class B felony.

**History.** Acts 1994 (2nd Ex. Sess.), No. 33, § 3; 1994 (2nd Ex. Sess.), No. 34, § 3.

## CHAPTER 75

### OPERATION OF AIRCRAFT WHILE INTOXICATED

#### SECTION.

5-75-101. Definitions.

5-75-102. Unlawful acts.

5-75-103. Implied consent.

5-75-104. Administration.

#### SECTION.

5-75-105. Validity — Approved methods.

5-75-106. Criminal prosecution — Evidence.

5-75-107. Blood alcohol testing devices.

#### **5-75-101. Definitions.**

As used in this chapter:

(1) “Aircraft” means any contrivance invented, used, or designed for the navigation of or flight in the air, and that is required to be registered under the laws of the United States;

(2)(A) “Controlled substance” means a drug, substance, or immediate precursor in Schedules I through VI.

(B) The fact that any person charged with a violation of this chapter is or has been entitled to use that drug or controlled substance under the laws of this state does not constitute a defense against any charge of violating this chapter; and

(3) “Intoxicated” means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that

the operator's or navigator's reactions, motor skills, and judgment are substantially altered and the operator or navigator, therefore, constitutes a clear and substantial danger of physical injury or death to himself or herself and other persons.

**History.** Acts 1993, No. 824, § 1.

under subchapter 2 of Chapter 64 of this title.

**Publisher's Notes.** Regarding Schedules I-VI controlled substances, see note

### 5-75-102. Unlawful acts.

(a)(1) It is unlawful and punishable as provided in this chapter for any person who is intoxicated to operate, navigate, or be in actual physical control of any aircraft.

(2) It is unlawful and punishable as provided in this chapter for any person to operate, navigate, or be in actual physical control of any aircraft if at that time there was an alcohol concentration of four hundredths (0.04) or more in the person's breath or blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

(3) It is unlawful and punishable as provided in this chapter for any person who is at an airport to perform his or her duties as a member of the flight crew of an aircraft and who has an alcohol concentration of four hundredths (0.04) or more in the person's breath or blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance, to:

(A) Present himself or herself at:

- (i) The security checkpoint at the airport;
- (ii) The security identification area; or
- (iii) An aircraft ramp; or

(B) Plan and accept flight documents at the ticket counter or gate.

(b)(1) Any person who pleads guilty or nolo contendere to or is found guilty of violating subsection (a) of this section is guilty of a Class A misdemeanor.

(2) For a second offense occurring within one (1) year, any person who pleads guilty or nolo contendere to or is found guilty of violating subsection (a) of this section is guilty of a Class D felony.

(3) Any person who pleads guilty or nolo contendere to or is found guilty of violating subsection (a) of this section and who at the time of the offense was a flight crew member and was in possession of a weapon is guilty of a Class D felony.

(c)(1)(A) If a person under arrest for violating subsection (a) of this section refuses upon the request of a law enforcement officer to submit to a chemical test as provided in § 5-75-103, no chemical test shall be given.

(B) However, any person who refuses to submit to a chemical test as provided for in § 5-75-103 is guilty of a Class A misdemeanor.

(2) For a second offense occurring within one (1) year, any person who refuses to submit to a chemical test as provided for in § 5-75-103 is guilty of a Class D felony.



(d) A complete report of any arrest or conviction made under the provisions of this chapter shall be forwarded to the Federal Aviation Administration or any other agency responsible for the licensing of pilots or navigators.

**History.** Acts 1993, No. 824, § 2; 2001, No. 561, § 17; 2003, No. 1267, § 1.

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of      ssembly, Criminal Law, 24 U. Ark. Little  
Legislation, 2001 Arkansas General As-      Rock L. Rev. 429.

5-75-103. Implied consent.

(a) Any person who operates or navigates any aircraft or is in actual physical control of any aircraft in this state is deemed to have given consent, subject to the provisions of § 5-75-104, to a chemical test of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood, if:

(1) The operator or navigator is arrested for any offense arising out of an act alleged to have been committed while the person was operating or navigating any aircraft while intoxicated or operating or navigating any aircraft while there was an alcohol concentration of four hundredths (0.04) or more in the person’s breath or blood;

(2) The person is involved in an accident while operating, navigating, or in actual physical control of any aircraft; or

(3) The person is stopped by a law enforcement officer who has reasonable cause to believe that the person, while operating, navigating, or in actual physical control of any aircraft, is intoxicated or has an alcohol concentration of four hundredths (0.04) or more in his or her breath or blood.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and a chemical test may be administered subject to the provisions of § 5-75-104.

**History.** Acts 1993, No. 824, § 3; 2001,      in (a), inserted “saliva” and “concentra-  
No. 561, § 18; 2013, No. 361, § 15.      tion”.

**Amendments.** The 2013 amendment,

RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of      ssembly, Criminal Law, 24 U. Ark. Little  
Legislation, 2001 Arkansas General As-      Rock L. Rev. 429.

**5-75-104. Administration.**

(a) A chemical test shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating, navigating, or in actual physical control of any aircraft while:

- (1) Intoxicated; or
- (2) There was an alcohol concentration of four hundredths (0.04) or more in the person’s breath or blood.

(b)(1) The law enforcement agency by which that law enforcement officer is employed shall designate which chemical test shall be administered, and the law enforcement agency is responsible for paying any expense incurred in conducting a chemical test.

(2) If the person tested requests that an additional chemical test be made, as authorized in § 5-75-105, the cost of the additional chemical test shall be borne by the person tested.

(3) If any person shall object to the taking of his or her blood for a chemical test, as authorized in this section, the breath, saliva, or urine of the person may be used for the chemical test.

**History.** Acts 1993, No. 824, § 4; 2001, No. 561, § 19; 2013, No. 361, § 16. **Amendments.** The 2013 amendment,

in (b)(3), inserted “saliva” and substituted “for the chemical test” for “to make the analysis”.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

**5-75-105. Validity — Approved methods.**

- (a)(1) “Alcohol concentration” means either:
  - (A) Grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood; or
  - (B) Grams of alcohol per two hundred ten liters (210 l) of breath.
- (2) The alcohol concentration of any other bodily substance shall be based upon grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood, the same being percent weight per volume or percent alcohol concentration.
  - (b)(1) To be considered valid under the provisions of this chapter, a chemical analysis of a person’s blood, urine, or breath shall be performed according to a method approved by the Department of Health or by an individual possessing a valid permit issued by the department for that purpose.
  - (2) The department may:
    - (A) Approve a satisfactory technique or method for the chemical analysis;
    - (B) Ascertain the qualifications and competence of an individual to conduct the chemical analysis; and
    - (C) Issue a permit to conduct the chemical analysis that is subject to termination or revocation at the discretion of the department.

(c) To be considered valid under the provisions of this section, a chemical analysis of a person's blood, urine, breath, or other bodily substance for determining the alcohol content of the breath or blood shall be performed according to a method approved by the State Board of Health.

(d)(1) When a person submits to a blood test at the request of a law enforcement officer under the provisions of this section, blood may be drawn by a physician or a person acting under the direction and supervision of a physician.

(2) The limitation in subdivision (d)(1) of this section does not apply to the taking of a breath or urine specimen.

(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.

(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.

(e)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person of the right provided in subdivision (e)(1) of this section.

(3) The refusal or failure of a law enforcement officer to advise the person of the right provided in subdivision (e)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to the chemical test taken at the direction of a law enforcement officer.

(f) Upon the request of a person who submits to a chemical test at the request of a law enforcement officer, full information concerning the chemical test shall be made available to the person or his or her attorney.

**History.** Acts 1993, No. 824, § 5; 2001, No. 561, § 20.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of      ssembly, Criminal Law, 24 U. Ark. Little  
Legislation, 2001 Arkansas General As-      Rock L. Rev. 429.



**5-75-106. Criminal prosecution — Evidence.**

(a) In any criminal prosecution of a person charged with the offense of operating or navigating any aircraft while intoxicated, the amount of alcohol in the defendant's breath or blood at the time or within two (2) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance gives rise to the following:

(1) If there was at that time an alcohol concentration less than four hundredths (0.04) in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(2) If there was at the time an alcohol concentration of four hundredths (0.04) or more in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(b) Subsection (a) of this section shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(c) The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health.

(d)(1)(A) A record or report of a certification, rule, evidence, analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Department of Health under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure, when duly attested to by the Director of the Office of Alcohol Testing of the Department of Health or an assistant, in the form of an original signature or by certification of a copy.

(B) A document described in subdivision (d)(1)(A) of this section is self-authenticating.

(2) However, the instrument performing the chemical analysis shall have been duly certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3) Nothing in this section is deemed to abrogate a defendant's right of cross-examination of the person who performs the calibration test or check on the instrument, the operator of the instrument, or a representative of the office.

(4) The testimony of the appropriate analyst or official may be compelled by the issuance of a proper subpoena ten (10) days prior to the date of the hearing or trial, in which case, the record or report is admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel.

**History.** Acts 1993, No. 824, § 6; 2001, No. 561, §§ 21, 22; 2007, No. 827, § 106.

# RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

## 5-75-107. Blood alcohol testing devices.

(a)(1) Any instrument used to determine the alcohol content of the breath of any person by analysis of the breath of the person for the purpose of determining if the person was operating or navigating any aircraft while intoxicated or with an alcohol concentration of four hundredths (0.04) or more shall be so constructed that the analysis is made automatically when a sample of the person's breath is placed in the instrument and without any adjustment or other action of the person administering the analysis.

(2) The instrument shall be so constructed that the breath alcohol content is shown by visible digital display on the instrument and on an automatic readout.

(b) Any breath analysis made by or through the use of a machine or instrument that does not conform to the requirements prescribed in this section is inadmissible in any criminal or civil proceeding.

(c)(1) The State Board of Health may adopt appropriate rules and regulations to carry out the intent and purposes of this section, and only an instrument approved by the board as meeting the requirements of this section and the regulations of the board shall be used for making a breath analysis for determining breath alcohol concentration.

(2)(A) The Department of Health specifically may limit by its rules the types or models of testing devices that may be approved for use in Arkansas for the purposes set forth in this section.

(B) The approved types or models shall be specified by manufacturer's name and model.

**History.** Acts 1993, No. 824, § 7; 2001, No. 561, §§ 23, 24.

**A.C.R.C. Notes.** As enacted by Acts 1993, No. 824, § 7, this section contained a subsection (d) which read: "All law en-

forcement agencies which conduct blood alcohol testing shall be in full compliance with the provisions of this act by July 1, 1993." The act did not have an emergency clause.

# RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 U. Ark. Little Rock L. Rev. 429.

## CHAPTER 76

### OPERATION OF MOTORBOATS WHILE INTOXICATED

SECTION.

5-76-101 — 5-76-108. [Repealed.]

5-76-101 — 5-76-108. [Repealed.]

**Publisher’s Notes.** Former chapter 76, concerning the operation of motorboats while intoxicated, was repealed by Acts 2015, No. 299, § 16. The former chapter was derived from the following sources:

5-76-101. Acts 1995, No. 518, § 1; 2005, No. 1458, § 1; 2009, No. 693, § 1.

5-76-102. Acts 1995, No. 518, §§ 2-4, 6, 11, 12, 14; 2001, No. 561, §§ 25-27; 2005, No. 1461, § 1; 2007, No. 827, §§ 107, 108, 109.

5-76-103. Acts 1995, No. 518, § 5; 1997, No. 788, § 2; 1997, No. 1341, § 2; 2007, No. 1196, § 2; 2013, No. 1107, § 9.

5-76-104. Acts 1995, No. 518, §§ 7-10; 1997, No. 823, § 1; 2001, No. 561, §§ 28, 29; 2013, No. 361, §§ 17, 18.

5-76-105. Acts 1995, No. 518, §§ 12, 13; 2001, No. 561, §§ 30, 31.

5-76-106. Acts 1995, No. 518, § 13.

5-76-107. Acts 2005, No. 1458, § 2.

5-76-108. Acts 2005, No. 1458, § 2.

For current law, see the Omnibus DWI or BWI Act, § 5-65-101 et seq.

CHAPTER 77

OFFICIAL INSIGNIA

- SUBCHAPTER.
1. GENERAL PROVISIONS. [RESERVED.]

2. EMERGENCY LIGHTS AND LAW ENFORCEMENT INSIGNIA SALES.

3. BLUE LIGHT SALES. [REPEALED.]

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved.]

SUBCHAPTER 2 — EMERGENCY LIGHTS AND LAW ENFORCEMENT INSIGNIA

SALES

- SECTION.

5-77-201. Blue light or blue lens cap sales.

5-77-202. Law enforcement insignia sales.

5-77-203. Regulations.
- SECTION.

5-77-204. Emergency lights and sirens — Prohibited persons.

5-77-205. Resale of law enforcement vehicles.

5-77-201. Blue light or blue lens cap sales.

- (a)(1) It is unlawful to sell or transfer a blue light or blue lens cap to any person other than a law enforcement officer or a county coroner.
- (2) It is unlawful for a person other than a law enforcement officer or a county coroner to buy a blue light or blue lens cap.
- (b) Before selling a blue light or blue lens cap, the seller shall require the buyer to provide identification that legally demonstrates that the buyer is a law enforcement officer or a county coroner.
- (c) Any sale of a blue light or blue lens cap shall be reported to the Department of Arkansas State Police on a form prescribed by the department.
- (d) Upon conviction, a person who violates this section is guilty of a Class D felony.
- (e) As used in this section:



(1) “Blue lens cap” means a lens cap designed to produce a blue color of light when light from a device designed for an emergency vehicle passes through the lens cap; and

(2) “Blue light” means any operable device that:

(A) Emits a blue color of light;

(B) Is designed for use by an emergency vehicle or is similar in appearance to a device designed for use by an emergency vehicle; and

(C) Can be operated by use of the vehicle’s battery, the vehicle’s electrical system, or a dry cell battery.

**History.** Acts 1997, No. 1281, § 1; 2007, No. 827, § 110.

**Cross References.** Lights for emergency vehicles, § 27-36-301 et seq.

### **5-77-202. Law enforcement insignia sales.**

(a)(1) It is unlawful to sell official law enforcement insignia to any person other than a law enforcement officer.

(2) It is unlawful for a person other than a law enforcement officer to buy official law enforcement insignia.

(b) Before selling official law enforcement insignia, the seller shall require the buyer to provide identification that legally demonstrates that the buyer is a law enforcement officer.

(c) A violation of this section is a Class A misdemeanor.

(d) As used in this section, “official law enforcement insignia” means those items relating to the performance of a person’s duty as a law enforcement officer when the items are formally sanctioned by the law enforcement agency employing the person.

**History.** Acts 1997, No. 1281, § 2.

### **5-77-203. Regulations.**

The Department of the Arkansas State Police shall promulgate regulations to implement this subchapter, including regulations that define the type of identification necessary to legally demonstrate that a person is a law enforcement officer or a county coroner.

**History.** Acts 1997, No. 1281, § 3.

### **5-77-204. Emergency lights and sirens — Prohibited persons.**

(a) It is unlawful for a person who has pleaded guilty or nolo contendere to or has been found guilty of a felony or domestic battering in the third degree, § 5-26-305, or a person required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., to knowingly:

(1) Purchase or possess an emergency vehicle light or siren with a purpose to install or use the emergency vehicle light or siren on a motor vehicle that reasonably appears to be or that mimics a law enforcement vehicle;

(2) Install or use an emergency vehicle light or siren on a motor vehicle that reasonably appears to be or that mimics a law enforcement vehicle; or

(3) Operate a motor vehicle that reasonably appears to be or that mimics a law enforcement vehicle and the motor vehicle has an emergency vehicle light or siren installed on the motor vehicle or in use on the motor vehicle.

(b) It is a defense to prosecution under this section that the person was a certified law enforcement officer acting within the scope of his or her duty.

(c) As used in this section:

(1) “Emergency vehicle light” means a device that emits a light of any color and that is:

(A) Designed for use by an emergency vehicle; or

(B) Similar in appearance to a device designed for use by an emergency vehicle;

(2) “Law enforcement vehicle” means any vehicle owned or operated by a law enforcement agency; and

(3) “Siren” means an acoustic or electronic device producing a loud or wailing sound as a signal or warning.

(d) A violation of this section is a Class A misdemeanor.

**History.** Acts 2009, No. 561, § 1.

### **5-77-205. Resale of law enforcement vehicles.**

(a) Except as provided in subsection (b) of this section, before a law enforcement vehicle is offered for sale to the public, the seller of the law enforcement vehicle shall remove from the law enforcement vehicle the:

(1) Lightbar;

(2) Spotlight;

(3) Siren;

(4) Law enforcement decals and signage;

(5) Radios; and

(6) Other items associated solely with law enforcement vehicles.

(b) The items required to be removed under subdivisions (a)(1)-(6) of this section are not required to be removed if the law enforcement vehicle is sold to a law enforcement agency.

(c) A violation of subsection (a) of this section is a violation and punishable by a fine of not more than one thousand dollars (\$1,000).

**History.** Acts 2009, No. 792, § 1.

## **SUBCHAPTER 3 — BLUE LIGHT SALES**

SECTION.

5-77-301. [Repealed.]

**5-77-301. [Repealed.]**

**Publisher's Notes.** This subchapter, concerning blue light sales, was repealed by Acts 2007, No. 827, § 111. The subchapter was derived from the following

source:

5-77-301. Acts 1997, No. 497, § 2.  
For current law, see § 5-77-201.

**CHAPTER 78**  
**TOBACCO**

SECTION.

5-78-101. [Repealed.]

5-78-102. Possession of cigarette or tobacco product by minor —  
Confiscation — Additional  
punishment.

**5-78-101. [Repealed.]**

**Publisher's Notes.** This section, concerning the possession, purchase and use of cigarettes by minors, was repealed by

Acts 2005, No. 1962, § 121. The section was derived from Acts 1999, No. 1331, § 1.

**5-78-102. Possession of cigarette or tobacco product by minor —  
Confiscation — Additional punishment.**

(a) A cigarette or tobacco product found in the possession of a person under eighteen (18) years of age may be confiscated by a certified law enforcement officer or a school official and immediately destroyed.

(b) If a minor who is found by a court to be in violation of any criminal statute is also found to have been in possession of a cigarette or tobacco product at the time of the violation of the criminal statute, the court may order the minor to perform up to three (3) hours of community service and to enroll in a tobacco education program, in addition to any other punishment imposed by the court for the violation of the criminal statute.

(c)(1) Any additional punishment ordered by the court under subsection (b) of this section is not a criminal offense and shall not be recorded as a criminal offense in the records of this state.

(2) All records of a proceeding under this section shall be permanently expunged from any record created or maintained by any agency, department, county, or municipality.

**History.** Acts 1999, No. 1331, § 2; 2011, No. 868, § 2; 2013, No. 1125, § 20.

**A.C.R.C. Notes.** Acts 2011, No. 868, § 1, provided: "Legislative findings.

"(a) It is the public policy of this state to prohibit the sale of tobacco products to persons younger than eighteen (18) years of age and prohibit the use of tobacco by

persons younger than eighteen (18) years of age.

"(b) Studies show that ninety percent (90%) of adult smokers began when they were in their teens, or earlier, and two-thirds (⅔) become regular, daily smokers before they reach nineteen (19) years of age.



“(c) Even though Arkansas retailers have a strict policy of not selling tobacco products to minors, a sizable percentage of minors do obtain and use tobacco products.

“(d) Although the use of tobacco products by minors is an unlawful act, it is only a violation and should not be treated as a criminal offense.

“(e) A stronger deterrent is needed to discourage the illegal use of tobacco products by minors.”

**Amendments.** The 2011 amendment added (b) and (c).

The 2013 amendment, in (b), inserted “criminal”, “at the time of the violation of the criminal statute”, and “for the violation of the criminal statute” and substituted “have been” for “be”.

**Cross References.** Providing minors with tobacco products, vapor products, alternative nicotine products, e-liquid products, and cigarette papers, § 5-27-227.

## CHAPTER 79

### BODY ARMOR

#### SECTION.

5-79-101. Criminal possession of body armor.

#### 5-79-101. Criminal possession of body armor.

(a) A person commits criminal possession of body armor if the person knowingly possesses body armor and he or she:

(1) Has been found guilty of or has pleaded guilty or nolo contendere to any of the following offenses:

- (A) Capital murder, § 5-10-101;
- (B) Murder in the first degree, § 5-10-102;
- (C) Murder in the second degree, § 5-10-103;
- (D) Manslaughter, § 5-10-104;
- (E) Aggravated robbery, § 5-12-103;
- (F) Battery in the first degree, § 5-13-201;
- (G) Aggravated assault, § 5-13-204; or
- (H) A felony violation of § 5-64-401 et seq.; or

(2) Is committing or attempts to commit:

- (A) A felony involving violence as defined in § 5-4-501(d)(2);
- (B) Capital murder, § 5-10-101, manslaughter, § 5-10-104, or negligent homicide, § 5-10-105;
- (C) False imprisonment in the first degree, § 5-11-103, false imprisonment in the second degree, § 5-11-104, vehicular piracy, § 5-11-105, or permanent detention or restraint, § 5-11-106;
- (D) Robbery, § 5-12-102;
- (E) Battery in the second degree, § 5-13-202; or
- (F) Trafficking of persons, § 5-18-103.

(b) As used in this section, “body armor” means any material designed to be worn on the body and to provide bullet penetration resistance.

(c) Criminal possession of body armor is a Class D felony.

**History.** Acts 1999, No. 1449, § 1; 2005, No. 1994, § 299; 2013, No. 542, § 1.

**Amendments.** The 2013 amendment rewrote (a) and (c).

**RESEARCH REFERENCES**

**ALR.** Validity, Construction, and Application of State Statutes Criminalizing Possession of Body Armor by Felon Convicted of Violent Crime. 31 A.L.R.6th 615.

Validity, Construction, and Application of 18 U.S.C. § 931 Criminalizing Possession of Body Armor by Felon Convicted of Violent Crime. 21 ALR Fed. 2d 361.

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**Driving or boating while intoxicated.**

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**Drug analysis records and reports.**

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Burglary, trespass and other intrusions, §5-39-101.

**Commercial sexual activity.**

Human trafficking, §5-18-102.

**Common carrier.**

Criminal liability.  
Justification, §5-2-601.

**Communication.**

Cyberbullying, §5-71-217.

**Communication device.**

Controlled substances, §5-64-404.  
Theft of communications services, §5-37-401.

**Communication service.**

Theft of communications services, §5-37-401.

**Communication service provider.**

Theft of communications services, §5-37-401.

**Communications system.**

Terrorism, §5-54-201.

**Compensation.**

Corruption in public office, §5-52-108.

**Competitive activity.**

Cruelty to animals, §5-62-102.

**Compliance monitor.**

Mental disease or defect of criminal defendant, §5-2-301.

**Computer.**

Child pornography, §5-27-601.  
Computer related crimes, §§5-41-102, 5-41-201.  
Terrorism, §5-54-201.

**Computer contaminant.**

Computer related crimes, §5-41-201.

**Computer network.**

Computer related crimes, §5-41-102.  
Child pornography, §5-27-601.  
Terrorism, §5-54-201.

**Computer program.**

Computer related crimes, §5-41-102.  
Child pornography, §5-27-601.  
Terrorism, §5-54-201.

**Computer software.**

Child pornography, §5-27-601.

**DEFINED TERMS —Cont'd****Computer software —Cont'd**

Computer related crimes, §5-41-102.

**Computer system.**

Computer related crimes, §5-41-102.  
Child pornography, §5-27-601.

**Concealed.**

Concealed weapons, §5-73-301.

**Conduct.**

Criminal liability, §5-2-201.  
Criminal use of property, §5-42-203.

**Consent.**

Offenses involving farm animals and research facilities, §5-62-202.

**Contraband, §5-73-101.**

Criminal use of property, §5-42-203.

**Contraband property.**

Forfeiture of property, §5-5-301.

**Controlled substance, §5-64-101.**

Aircraft operation, §5-75-101.  
Driving or boating while intoxicated, §5-65-102.

**Controlled substance analog,**

§5-64-414.

**Convicted.**

Concealed weapons, §5-73-301.

**Copy.**

Theft, §5-36-101.

**Correctional facility.**

Obstructing governmental operations, §5-54-101.

**Costs of incidental damage.**

Theft of scrap metal, §5-36-123.

**Counterfeit substance.**

Controlled substances, §5-64-101.

**Course of conduct.**

Stalking, §5-71-229.

**Credit card.**

Forgery and fraudulent practices, §5-37-101.

**Crime of pecuniary gain.**

Criminal gangs, organizations or enterprises, §5-74-103.  
Criminal use of property, §5-42-203.  
Gang recruiting, §5-74-202.

**Crime of violence.**

Criminal gangs, organizations or enterprises, §5-74-103.  
Criminal use of property, §5-42-203.  
Gang recruiting, §5-74-202.  
Machine gun act, §5-73-202.

**Criminal episode.**

Cruelty to animals, §5-62-103.  
Aggravated cruelty to a dog, cat, or horse, §5-62-104.

Property theft, §5-36-103.

**Criminal gangs, organizations or enterprises, §5-74-103.**

Gang recruiting, §5-74-202.



**DEFINED TERMS —Cont'd****Criminal proceeds.**

Criminal use of property, §5-42-203.

**Critical infrastructure.**

Unlawful use of unmanned aircraft system, §5-60-103.

**Cruel mistreatment.**

Cruelty to animals, §5-62-102.

**Curtilage.**

Use of force in defense of person, §5-2-607.

**Custody.**

Obstructing governmental operations, §5-54-101.

**Damages.**

Computer-related crimes, §5-41-106.

**Data.**

Computer related crimes, §§5-41-102, 5-41-201.

Terrorism, §5-54-201.

**Dating relationship.**

Domestic violence, §5-26-302.

**Deadly physical force.**

Criminal liability.

Justification, §5-2-601.

Obstructing governmental operations, §5-54-101.

**Deadly weapon.**

Criminal offenses, §5-1-102.

**Debt adjusting, §5-63-301.****Debt bondage.**

Human trafficking, §5-18-102.

**Debtor.**

Debt adjusting, §5-63-301.

**Deception.**

Forgery and fraudulent practices, §5-37-101.

Theft, §5-36-101.

**Defendant.**

Criminal offenses, §5-1-102.

**Deliver.**

Controlled substances, §5-64-101.

**Delivery.**

Controlled substances, §5-64-101.

**Deprive.**

Offenses involving farm animals and research facilities, §5-62-202.

Theft, §5-36-101.

**Derived pecuniary gain.**

Criminal fines, §5-4-201.

**Designated receiving facility or program.**

Mental disease or defect of criminal defendant, §5-2-301.

**Destructive device, §5-73-101.****Detonator, §5-73-101.****Deviate sexual activity.**

Computer crimes.

Child pornography, §5-27-601.

**DEFINED TERMS —Cont'd****Deviate sexual activity —Cont'd**

Disorderly conduct, §5-71-101.

Offenses involving the family, §5-25-101.

Sexual offenses, §5-14-101.

**Dispense.**

Controlled substances, §5-64-101.

**Dispenser.**

Controlled substances, §5-64-101.

**Displays publicly.**

Obscenity, §5-68-306.

**Disqualification.**

Driving or boating while intoxicated, §5-65-401.

**Dissemination.**

Stalking of a child, §5-27-306.

**Distribute.**

Controlled substances, §5-64-101.

Explosives, §5-73-101.

**Distributor.**

Controlled substances, §5-64-101.

**Domestic abuse.**

Use of force in defense of person, §5-2-607.

**Driver.**

School buses, §5-39-214.

**Drug.**

Controlled substances, §5-64-101.

**Drug device, §5-64-801.****Drug offense.**

Denial of driving privileges, restricted driving permit, issuance, §5-64-710.

**Drug paraphernalia, §5-64-101.****Drug precursor, §5-64-415.****Dwelling.**

Justification, §5-2-601.

**E-cigarette, §5-27-227.****Effective consent.**

Offenses involving farm animals and research facilities, §5-62-202.

**Elderly person.**

Methamphetamine manufacture, §5-64-407.

**Electronic cash register.**

Forgery and fraudulent practices, §5-37-101.

**Electronic mail.**

Child pornography computer crimes, §5-27-601.

**Electronic mail service provider.**

Child pornography computer crimes, §5-27-601.

**Electronic means.**

Cyberbullying, §5-71-217.

**Element of the offense, §5-1-102.**

**DEFINED TERMS —Cont'd****Emergency vehicle light.**

Persons prohibited from possessing,  
§5-77-204.

**Emotional distress.**

Stalking, §5-71-229.

**Employee.**

Obscenity.

Defenses, §5-68-308.

**Employee of a correctional facility.**

Battery, second degree, §5-13-202.

**Employee of local detention facility.**

Concealed handgun permits,  
§5-73-304.

**Encryption.**

Computer related crimes, §5-41-201.

**Endangered person.**

Criminal abuse of adults, §5-28-101.

**Enter or remain unlawfully.**

Burglary, trespass and other  
intrusions, §5-39-101.

**Enterprise, §§5-74-103, 5-74-202.**

Forgery and fraudulent practices,  
§5-37-101.

**Ephedrine, §5-64-1105.****Equine.**

Cruelty to animals, §5-62-102.

**Equine activity.**

Cruelty to animals, §5-62-102.

**Escape.**

Obstructing governmental operations,  
§5-54-101.

**Euthanizing.**

Cruelty to animals, §5-62-102.

**Event.**

Ticket scalping, §5-63-201.

**Exploitation.**

Criminal abuse of adults, §5-28-101.

**Explosive materials.**

Promoting civil disorder, §5-71-301.

**Explosive or incendiary device.**

Promoting civil disorder, §5-71-301.

**Explosives, §5-73-101.****Extended post-conviction no contact order, §5-4-106.****Extortion.**

Human trafficking, §5-18-102.

**Facilities.**

Firearms.

Carrying loaded firearms, §5-73-122.

**False information.**

Unlawful procurement of firearm,  
§5-73-111.

**False material statement.**

Offenses relating to judicial and other  
official proceedings, §5-53-101.

**Family or household member.**

Domestic violence, §5-26-302.

**DEFINED TERMS —Cont'd****Fatigued.**

Negligent homicide, §5-10-105.

**Film.**

Obscene films, §5-68-203.

**Financial benefit.**

Defrauding a prospective adoptive  
parent, §5-37-216.

**Financial harm.**

Human trafficking, §5-18-102.

**Financial institution.**

Forgery and fraudulent practices,  
§5-37-101.

**Financial instrument.**

Computer-related crimes, §5-41-102.

**Financing statement.**

Fraudulently filing, §5-37-215.

**Firearm, §5-27-210.**

Certification for application to transfer  
or manufacture, §5-73-112.

Criminal offenses, §5-1-102.

**Fiscal agents.**

Medicaid fraud, §5-55-102.

**Food coupons.**

Traffic in illegal food coupons or  
vouchers, §5-55-201.

**Forcible compulsion.**

Sexual offenses, §5-14-101.

**Forivolous.**

Mental disease or defect of criminal  
defendant, §5-2-301.

**Funeral.**

Violating the peace at a funeral,  
§5-71-230.

**Gaming device.**

Transmission of information,  
§5-66-114.

**Good faith effort.**

Suspension of sentence or probation,  
§5-4-323.

**Governmental function.**

Disorderly conduct, §5-71-101.

Obstructing governmental operations,  
§5-54-101.

**Government in the United States.**

Advocating assassination or overthrow  
of government, §5-51-202.

**Guardian.**

Sexual offenses, §5-14-101.

**Handgun, §§5-73-119, 5-73-120.**

Concealed weapons, §5-73-301.

**Harass.**

Domestic violence, §5-26-302.

**Hard-core sexual conduct.**

Obscenity, §5-68-302.

**Harmful to minors.**

Selling or loaning pornography to  
minors, §5-68-501.

**DEFINED TERMS —Cont'd****High managerial agent.**

Criminal liability, §5-2-501.

**Highway.**

Sabotage prevention, §5-51-302.

**Highway commissioners.**

Sabotage prevention, §5-51-302.

**Hoax substance.**

Terrorism, §5-54-201.

**Humanely killing.**

Cruelty to animals, §5-62-102.

**Identifying information.**

Financial identity fraud, §5-37-227.

**Ignition interlock device, §5-65-118.**Driving or boating while intoxicated,  
§5-65-102.**Immediate family.**

Stalking, §5-71-229.

Threatening judge or juror, §5-53-201.

**Immediate precursor.**

Controlled substances, §5-64-101.

**Imminent danger to health or safety.**

Criminal abuse of adult, §5-28-101.

**Immobilization.**Driving or boating while intoxicated,  
§5-65-401.**Impaired person.**

Criminal abuse of adults, §5-28-101.

**Implement for escape.**Obstructing governmental operations,  
§5-54-101.**Implement for unauthorized departure.**Obstructing governmental operations,  
§5-54-101.**Imprisonment, §5-4-101.****In a manner offensive to a person of reasonable sensibilities.**

Abuse of a corpse, §5-60-101.

**Incendiary device, §5-71-301.****Incidental damage.**

Theft of scrap metal, §5-36-123.

**Incompetent.**Kidnapping and related offenses,  
§5-11-101.Offenses involving the family,  
§5-25-101.**Incompetent person.**Methamphetamine manufacture,  
§5-64-407.**Influence.**Driving or boating while intoxicated,  
§5-65-102.**Informant.**

Intimidating, §5-53-114.

Retaliation against, §5-53-112.

**Information service.**

Computer related crimes, §5-41-201.

**DEFINED TERMS —Cont'd****Instrument of crime.**

Weapons, §5-73-101.

**Interactive computer service.**Child pornography computer crimes,  
§5-27-601.**Internet.**

Computer crimes.

Child pornography, §5-27-601.

**In the presence of a child.**

Criminal offenses, §5-4-701.

**Intimidate.**

Domestic violence, §5-26-302.

**Intoxicated.**

Aircraft operation, §5-75-101.

Driving or boating while intoxicated,  
§5-65-102.

Negligent homicide, §5-10-105.

**Intoxication.**

Criminal liability, §5-2-207.

**Involuntary servitude.**

Human trafficking, §5-18-102.

**Judicial official.**

Threatening judge or juror, §5-53-201.

**Juror.**Offenses relating to judicial  
proceedings, §5-53-101.

Threatening judge or juror, §5-53-201.

**Juvenile training school.**Obstructing governmental operations,  
§5-54-101.**Knife, §5-73-120.****Knowingly.**

Criminal offenses, §5-1-102.

Culpable mental states, §5-2-202.

Selling or loaning pornography to  
minors, §5-68-501.**Labor.**

Human trafficking, §5-18-102.

**Law.**

Criminal offenses, §5-1-102.

**Law enforcement officer.**Controlled substances violations,  
§5-64-412.

Criminal offenses, §5-1-102.

Cruelty to animals, §5-62-102.

**Law enforcement vehicle.**Persons prohibited from possessing,  
§5-77-204.**Licensed dealer.**Unlawful procurement of firearm,  
§5-73-111.**Licensed veterinarian.**

Cruelty to animals, §5-62-102.

**Licensee.**

Concealed weapons, §5-73-301.

**Live public show.**

Obscenity, §5-68-302.



**DEFINED TERMS —Cont'd****Livestock.**

- Cruelty to animals, §5-62-102.
- Forfeiture of property, §5-5-301.
- Terrorism, §5-54-201.

**Local law enforcement agency.**

- Cruelty to animals, §5-62-102.

**Long-term care facility.**

- Criminal abuse of adults, §5-28-101.

**Long-term care facility resident.**

- Criminal abuse of adults, §5-28-101.

**Long-term care facility resident maltreatment.**

- Criminal abuse of adults, §5-28-101.

**Lottery.**

- Lottery fraud, §5-55-501.

**Machine gun, §5-73-202.****Magnetic disk memory.**

- Selling or loaning pornography to minors, §5-68-501.

**Magnetic tape memory.**

- Selling or loaning pornography to minors, §5-68-501.

**Mailable matter.**

- Obscenity, §5-68-403.

**Manufacture.**

- Controlled substances, §5-64-101.

**Manufacture, assembly, or development of a communication device.**

- Theft of communications services, §5-37-401.

**Manufacture, assembly, or development of an unlawful access device.**

- Theft of communications services, §5-37-401.

**Manufacture of a wireless device, §5-36-302.****Marijuana, §5-64-101.****Material, §5-68-403.**

- Promoting obscene materials, §5-68-303.
- Selling or loaning pornography to minors, §5-68-501.

**Material support or resources.**

- Terrorism, §5-54-201.

**Medicaid recipient.**

- Medicaid fraud, §5-55-102.

**Menace.**

- Human trafficking, §5-18-102.

**Mental anguish.**

- Capital murder.
- Aggravating circumstances, §5-4-604.

**Mental disease or defect, §5-2-301.****Mentally defective.**

- Sexual offenses, §5-14-101.

**DEFINED TERMS —Cont'd****Mentally incapacitated.**

- Sexual offenses, §5-14-101.

**Mental retardation.**

- Death penalty, §5-4-618.

**Message.**

- Computer-related crimes, §5-41-102.

**Methamphetamine.**

- Exposing child to chemical substances, §5-27-230.

**Methamphetamine-contaminated motor vehicle, §5-64-510.****Minor.**

- Criminal liability, §5-2-601.
- Human trafficking, §5-18-102.
- Offenses involving the family, §5-25-101.
- Pornography.
- Selling or loaning to minors, §5-68-501.
- Sexual offenses, §5-14-101.
- Weapons, §5-73-101.

**Misrepresentation.**

- Theft of public benefits, §5-36-201.

**Monetary instruments.**

- Criminal use of property, §5-42-203.

**Motion picture.**

- Motion picture piracy, §5-36-122.

**Motion picture theater.**

- Motion picture piracy, §5-36-122.

**Motorboat.**

- Driving or boating while intoxicated, §5-65-102.

**Motor fuel.**

- Theft, §5-36-101.

**Motor vehicle.**

- Arson, §5-38-301.
- Controlled substances offenses.
- Denial of driving privileges for minors, §5-64-710.

**Multipurpose device.**

- Theft of communications services, §5-37-401.

**Narcotic drug, §5-64-101.****Neglect.**

- Criminal abuse of adults, §5-28-101.

**Negligently.**

- Culpable mental states, §5-2-202.

**Network.**

- Computer related crimes, §5-41-201.

**Noncontrolled substances, §5-64-101.****Notice.**

- Offenses involving farm animals and research facilities, §§5-62-202, 5-62-203.

**Novelty lighter, §5-60-102.****Nude or partially nude person.**

- Voyeurism, §5-16-102.

**DEFINED TERMS —Cont'd****Nudism**, §5-68-204.**Nudity.**

Possession of sexually explicit digital material by a minor, §5-27-609.

Selling or loaning pornography to minors, §5-68-501.

**Oath.**

Offenses relating to judicial and other official proceedings, §5-53-101.

**Obscene**, §5-68-403.

Films, §5-68-203.

**Obscene material**, §5-68-302.**Obscene performance**, §5-68-302.**Obscenity.**

Public display of obscenity, §5-68-205.

**Obtain.**

Theft, §5-36-101.

**Occupiable structure.**

Criminal liability.

Justification, §5-2-601.

Damage or destruction of property, §5-38-101.

Disorderly conduct, §5-71-101.

**Official proceeding.**

Offenses relating to, §5-53-101.

**Omission.**

Criminal liability, §5-2-201.

**Organization.**

Criminal liability, §5-2-501.

Human trafficking, §5-18-102.

**Owner.**

Criminal impersonation, §5-37-208.

Cruelty to animals, §5-62-102.

Offenses involving farm animals and research facilities, §5-62-202.

Recordings.

Unauthorized copying or sale, §5-37-510.

**Parent**, §5-27-210.**Parking lot.**

Concealed weapons, §5-73-301.

Possession of firearms on school property, §5-73-119.

**Participant.**

Bribery of professional and amateur sports participants, §5-66-115.

**Passenger.**

Misconduct on bus, §5-60-112.

**Pecuniary gain.**

Fines.

Limitations on amount, §5-4-201.

**Pending charge.**

Failure to appear, §5-54-120.

**Peonage.**

Human trafficking, §5-18-102.

**Performance.**

Computer crimes.

Child pornography, §5-27-601.

**DEFINED TERMS —Cont'd****Performance —Cont'd**

Selling or loaning pornography to minors, §5-68-501.

Use of children in sexual performances, §5-27-401.

**Permitted construction site.**

Theft, §5-36-103.

Theft of scrap metal, §5-36-123.

**Person.**

Controlled substances, §5-64-101.

Criminal offenses, §5-1-102.

Cruelty to animals, §5-62-102.

Debt adjusting, §5-63-301.

Machine gun act, §5-73-202.

Medicaid fraud, §5-55-102.

Obscene films, §5-68-203.

Obscenity, §5-68-403.

Offenses involving farm animals and research facilities, §5-62-202.

Radio voice privacy adapters, §5-54-130.

Recordings.

Unauthorized copying or sale, §5-37-510.

Selling or loaning pornography to minors, §5-68-501.

Terrorism, §5-54-201.

**Phenylpropanolamine**, §5-64-1105.**Physical force.**

Criminal liability.

Justification, §5-2-601.

Obstructing governmental operations, §5-54-101.

Prostitution, §5-70-101.

Robbery, §5-12-101.

**Physical injury.**

Criminal abuse of adults, §5-28-101.

Criminal offenses, §5-1-102.

**Physically helpless.**

Sexual offenses, §5-14-101.

**Physician-assisted suicide**, §5-10-106.**Picket.**

Violating the peace at a funeral, §5-71-230.

**Place on probation**, §5-4-101.**Possess.**

Criminal offenses, §5-1-102.

**Possession.**

Offenses involving farm animals and research facilities, §5-62-202.

**Practitioner.**

Controlled substances, §5-64-101.

**Pre-adjudication.**

Probation, §5-4-902.

**Predicate criminal offense.**

Criminal gangs, organizations or enterprises, §5-74-103.

**DEFINED TERMS —Cont'd****Predicate criminal offense —Cont'd**

Criminal use of property, §5-42-203.  
Gang recruiting, §5-74-202.

**Pregnant.**

Defense of unborn child by pregnant woman, use of force, §5-2-615.

**Premises.**

Burglary, trespass and other intrusions, §5-39-101.  
Criminal liability.  
Justification, §5-2-601.

**Prescribed regimen of medical, psychiatric or psychological care or treatment.**

Mental disease or defect of criminal defendant, §5-2-301.

**Printed or written matter or material.**

Obscenity, §5-68-403.

**Private place.**

Voyeurism, §5-16-102.

**Private seller.**

Unlawful procurement of firearm, §5-73-111.

**Probation officer, §5-4-101.****Probation or parole, §5-4-101.****Procurer.**

Insurance fraud by use of procurer, §5-37-505.

**Producing.**

Sexual exploitation of children, §5-27-302.

**Production.**

Controlled substances, §5-64-101.

**Professional pest control activities.**

Cruelty to animals, §5-62-102.

**Profits from prostitution, §5-70-101.****Program.**

Computer related crimes, §5-41-201.

**Prohibited article.**

Obstructing governmental operations, §5-54-101.

**Promote.**

Obscenity, §5-68-302.  
Use of children in sexual performances, §5-27-401.

**Proof of age.**

Ephedrine, §5-64-1105.

**Proof of identity.**

Ephedrine, §5-64-1105.

**Proper identification.**

Controlled substances.  
Records of transactions, §5-64-1002.

**Property.**

Computer related crimes, §§5-41-102, 5-41-201.

**DEFINED TERMS —Cont'd****Property —Cont'd**

Damage or destruction of property, §5-38-101.  
Disorderly conduct, §5-71-101.  
Theft, §5-36-101.

**Property of another person.**

Damage or destruction of property, §5-38-101.  
Theft, §5-36-101.

**Prospective adoptive parent.**

Defrauding, §5-37-216.

**Protective services.**

Criminal abuse of adults, §5-28-101.

**Provider.**

Computer related crimes, §5-41-201.  
Insurance fraud by use of procurer, §5-37-505.

**Provider of Internet service.**

Computer related crimes, §5-41-201.

**Pseudoephedrine, §5-64-1105.****Public accommodation.**

Voyeurism, §5-16-102.

**Public benefits.**

Theft of public benefits, §5-36-201.

**Public buildings and other facilities.**

Disorderly conduct, §5-71-101.

**Public media.**

Insurance fraud by use of procurer, §5-37-505.

**Public official.**

Controlled substances violations, §5-64-412.

**Public park.**

Sex offenders, §5-14-128.

**Public place.**

Disorderly conduct, §5-71-101.  
Sexual offenses, §5-14-101.

**Public records.**

Obstructing governmental operations, §5-54-101.

**Public safety agency.**

Property theft, §5-36-103.  
Theft of scrap metal, §5-36-123.

**Public safety device.**

Theft of scrap metal, §5-36-123.

**Public school.**

Sex offenders, §5-14-132.

**Public servant.**

Criminal offenses, §5-1-102.

**Public show.**

Obscenity, §5-68-302.

**Public university, public college or community college.**

Concealed handguns in university, college, community college, §5-73-322.



**DEFINED TERMS —Cont'd**

**Public utility.**

Sabotage prevention, §5-51-302.

**Public view.**

Sexual offenses, §5-14-101.

**Purposely.**

Culpable mental states, §5-2-202.

**Qualified psychiatrist.**

Mental disease or defect of criminal defendant, §5-2-301.

**Qualified psychologist.**

Mental disease or defect of criminal defendant, §5-2-301.

**Reasonable belief.**

Criminal offenses, §5-1-102.

**Reasonable bona fide attempt.**

Selling or loaning pornography to minors, §5-68-501.

**Reasonably believes.**

Criminal offenses, §5-1-102.

**Receiving.**

Theft by receiving, §5-36-106.

Theft by receiving scrap metal, §5-36-124.

**Recidivism.**

Sentencing, §5-4-101.

**Recklessly.**

Culpable mental states, §5-2-202.

**Record.**

Medicaid fraud, §5-55-102.

**Recordings.**

Unauthorized copying or sale, §5-37-510.

**Recreational center.**

Controlled substances, §5-64-402.

**Refusal.**

Refusal to submit to arrest, §5-54-103.

**Relative.**

Re-homing of adopted child, §5-27-211.

**Relevant medical records.**

Exposing person to disease, §5-14-201.

**Render criminal assistance.**

Terrorism, §5-54-201.

**Repetitive.**

Mental disease or defect of criminal defendant, §5-2-301.

**Report.**

False reports.

Filing with law enforcement agency, §5-54-122.

**Reproduction.**

Computer crimes.

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